Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

No. 93-1823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

CARTER G. PHILLIPS
MARK D. HOPSON
JANET M. LETSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of the
State of Missouri
JOHN R. MUNICH *
Chief Counsel for Litigation
JAMES R. LAYTON
Appellate Counsel
MICHAEL J. FIELDS
BART A. MATANIC
JANE EILERMANN
NORMAN E. SIEGEL
Assistant Attorneys General
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Counsel for the State of Missouri, *et al.*

November 8, 1994 *** Counsel of Record**

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

56 pp

QUESTIONS PRESENTED

1. Whether a remedial desegregation program must remain in effect in an urban school district because student achievement throughout the school district, as measured by results on standardized test scores, has not risen to some unspecified level designed to achieve comparability to the results in surrounding suburban school districts.

2. Whether the courts below erred in implementing an interdistrict remedy in an intradistrict case by ordering salary increases for all employees of the school district for the purpose of increasing the desegregative attractiveness of the school district.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. The Liability Findings	3
B. The Remedial Orders	7
C. The Decisions Under Review	15
SUMMARY OF ARGUMENT	18
ARGUMENT	23
I. THE COURT-ORDERED SYSTEM-WIDE ACHIEVEMENT REQUIREMENTS AND ACROSS-THE-BOARD SALARY INCREASES CONSTITUTE A REMEDY THAT VASTLY EXCEEDS THE ONLY LEGITIMATE GOAL OF AN INTRADISTRICT DESEGREGATION PLAN: TO UNDO THE VESTIGES OF *DE JURE* SEGREGATION IN THE KANSAS CITY, MISSOURI, SCHOOL DISTRICT	23
A. Federal Judicial Authority To Remedy Racial Imbalance Is Limited To The Scope Of The Prior Unconstitutional Conduct	23
B. The Courts Below Acted Beyond Their Constitutional Authority In Imposing An Interdistrict Remedy To Cure An Intradistrict Violation	27

TABLE OF CONTENTS—Continued

	Page
C. The Courts Below Acted Beyond Their Constitutional Authority In Imposing A Remedy Designed To Cure Conditions That Are Not, As A Matter Of Law, "Vestiges" Of *De Jure* Segregation	32
II. EVEN IF THE "GOALS" OF THE REMEDIAL PLAN WERE WITHIN THE PROPER SCOPE OF THE AUTHORITY OF THE COURTS BELOW, THOSE COURTS MANDATED IMPERMISSIBLE MEANS FOR ACHIEVING THE STATED GOALS	45
A. The Eighth Circuit Erred As A Matter Of Law In Measuring The Success Of The Remedial Programs By Reference To Standardized Test Scores	45
B. Across-The-Board Salary Increases For Non-Instructional Employees Will Not Have The Effect Of Drawing Suburban Students To The KCMSD	49
CONCLUSION	50

TABLE OF AUTHORITIES

CASES

	Page
Austin Indep. Sch. Dist. v. *United States*, 429 U.S. 990 (1976)	35
Board of Educ. v. *Dowell*, 498 U.S. 237 (1991)	*passim*
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982)	48
Brown v. *Board of Educ.*, 347 U.S. 483 (1954) (*"Brown I"*)	7, 47
Brown v. *Board of Educ.*, 349 U.S. 294 (1955) (*"Brown II"*)	24
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979)	34
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977)	24, 35, 43, 44
Freeman v. *Pitts*, 112 S. Ct. 1430 (1992)	*passim*
Green v. *County Sch. Bd.*, 391 U.S. 430 (1968)	*passim*
Hills v. *Gautreaux*, 425 U.S. 284 (1976)	28
Jenkins v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984) (*"Jenkins I"*)	4, 5, 7, 36, 48
Jenkins v. *Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) (*"Jenkins II"*)	*passim*
Jenkins v. *Missouri*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) (*"Jenkins II"*)	*passim*
Jenkins v. *Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988) (*"Jenkins III"*)	11, 13, 38
Jenkins v. *Missouri*, 855 F.2d 1295 (8th Cir. 1988) (*"Jenkins III"*)	11, 32
Jenkins v. *Missouri*, 931 F.2d 470 (8th Cir.), *cert. denied*, 112 S. Ct. 437 (1991) (*"Jenkins IV"*)	11
Jenkins v. *Missouri*, 981 F.2d 1009 (8th Cir. 1992) (*"Jenkins V"*)	14
Jenkins v. *Missouri*, No. 94-1405 (8th Cir. Oct. 13, 1994) (*"Jenkins VI"*)	15, 31
Kadrmas v. *Dickinson Pub. Schs.*, 487 U.S. 450 (1988)	46
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973)	29, 34, 39

TABLE OF AUTHORITIES—Continued

	Page
Liddell v. *Missouri*, 731 F.2d 1294 (8th Cir. 1984)	28
Milliken v. *Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*)	*passim*
Milliken v. *Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*)	*passim*
Missouri v. *Jenkins*, 495 U.S. 33 (1990)	*passim*
Northeastern Fla. Chapter of Associated Gen. Contractors v. *Jacksonville*, 113 S. Ct. 2297 (1993)	46
Pasadena Bd. of Educ. v. *Spangler*, 427 U.S. 424 (1976)	*passim*
Richmond v. *J.A. Croson*, 488 U.S. 469 (1989)	24, 26
San Antonio Sch. Dist. v. *Rodriquez*, 411 U.S. 1 (1973)	46
School Dist. v. *Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978)	4
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)	*passim*
Turner v. *Fouche*, 396 U.S. 346 (1970)	46
United States v. *Overton*, 834 F.2d 1171 (5th Cir. 1987)	26
Warth v. *Seldin*, 422 U.S. 490 (1975)	47
Wygant v. *Jackson County Bd. of Educ.*, 476 U.S. 267 (1986)	33
CONSTITUTIONAL PROVISION	
U.S. Const. amend. XIV	2
OTHER AUTHORITIES	
D. Armor, *Why is Black Educational Achievement Rising*, The Public Interest (Summer 1992)	49
W. Page Keeton, *et al.*, *Prosser and Keeton on Torts* (5th ed. 1984)	34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1823

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF PETITIONERS

OPINIONS BELOW

The November 29, 1993, opinion of the court of appeals (Pet. App. A-1-27) is reported at 11 F.3d 755. The December 8, 1993, opinion of the court of appeals (Pet. App. A-28-35) is reported at 13 F.3d 1170. The order of February 24, 1994, denying rehearing (Pet. App. A-36-42) and the order of March 15, 1994, denying rehearing *en banc* (Pet. App. A-43-68) are reported at 19 F.3d 393. The district court's orders (Pet. App. A-69-121) of June 17, 1992, June 25, 1992, June 30, 1993, and July 30, 1993, are not reported.

JURISDICTION

The opinion of the court of appeals was entered on November 29, 1993. Pet. App. A-1-27. Rehearing was denied on February 24, 1994. Pet. App. A-36-42. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

This controversy arises out of the long-running Kansas City, Missouri, *intra*district school desegregation case, in which Missouri taxpayers have been obligated by court orders to expend more than $1.3 billion to fund a massive remedial program with overriding *inter*district features. Since the inception of the unprecedented remedy in the 1985-86 school year, these court-ordered "desegregation" expenses—borne largely by petitioner, the State of Missouri—have grown at an astounding rate: annual expenditures in fiscal year 1986 were $18 million; by fiscal year 1993, those annual costs had risen to $206 million. As it has grown, the remedial program has assumed all the appearances of an interdistrict remedy, despite the district court's express finding that there has been no interdistrict violation. At bottom, this extraordinarily expansive exercise of judicial remedial authority has far outstripped the scope of the constitutional violation on which it is based.

A. The Liability Findings.

1. In 1977, the Kansas City, Missouri, School District (the "KCMSD" or the "district") and certain KCMSD students, who were all children of KCMSD Board of Education members, filed suit against the State of Missouri, its Board of Education, various state officials, and twelve Missouri suburban school districts, claiming that defendants were responsible for unconstitutional *inter*district segregation throughout the metropolitan area.

At about the same time, the KCMSD initiated its own comprehensive intradistrict student reassignment plan, known as the "6-C Plan." Under the 6-C Plan, which remained fully in effect until the implementation of the court-ordered plan, the district pursued a number of desegregative measures: it changed boundary lines; paired and clustered elementary schools; created enlarged secondary attendance zones to allow two-way reassignments; and implemented non-contiguous zoning.[1] According to the KCMSD, the goal of the 6-C Plan was "a minimum of 30% minority enrollment . . . in every KCMSD school." *Jenkins* v. *Missouri*, 639 F. Supp. 19, 35 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) ("*Jenkins II*"). As a result of its implementation of the 6-C Plan, the KCMSD changed more than 16,000 KCMSD students' school assignments and attained the 30% goal, despite the fact that, during the Plan's implementation, white enrollment in the KCMSD decreased by 44%. Largely as a result of these and other desegregation efforts, in 1979, the Office of Civil Rights of the United States Department of Health, Education and Welfare certified the KCMSD's compliance with federal school desegregation requirements under Title VI of the 1964 Civil Rights Act. *Id.* at 36.

---

[1] This intradistrict desegregation plan was strikingly similar to those used effectively in creating unitary districts throughout the South. *See, e.g., Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992).

In May 1979, the plaintiffs filed an amended complaint against the KCMSD [2] and the federal and state defendants named in the original complaint, adding a claim of an intradistrict violation. The KCMSD filed a cross-claim against the State, "reiterating the allegation of interdistrict violation" made in the original complaint, and also seeking indemnification from the State for any intradistrict liability. *Jenkins II*, 807 F.2d 657, 661 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

2. Following an extended trial, the district court rejected in their entirety the claims for *inter*district relief. See Order of June 5, 1984, J.A. A-731-32; see also *Jenkins II*, 807 F.2d at 662 (district court found "that none of the allegedly discriminatory actions committed by the state or federal defendants had caused any significant current interdistrict segregation"). In addition, the court found a "[l]ack of proof of discriminatory intent in the establishment or changing of any school district boundary lines." Order of June 5, 1984, J.A. A-726.

The district court specifically addressed the issue of "white flight" from the KCMSD.[3] It found no evidence

[2] Shortly after the filing of the original complaint, the district court had realigned the KCMSD as a defendant. *School District* v. *Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978). Even after this realignment, the student plaintiffs and the KCMSD might well be seen as parties that have "joined forces apparently for the purpose of extracting funds from the state treasury," *Missouri* v. *Jenkins*, 495 U.S. 33, 76 (1990) (Kennedy, J., concurring in judgment and concurring in part) (internal quotations omitted). The position taken by the KCMSD in this Court clearly illustrates Justice Kennedy's point.

[3] Enrollment in the KCMSD was majority white until 1970. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984) ("*Jenkins I*"). As total enrollment in the KCMSD declined by more than 50% from the 1967-68 school year to the 1983-84 school year, white enrollment declined at a greater rate than black enrollment. *Id.* at 1495 (from 1958 to 1983, white enrollment decreased by 80 percent; from 1971 to 1983, black enrollment decreased by 30 percent). In the 1983-84 school year, the total enrollment was 68 percent black. These demographics suggest that "white flight" was the result of desegregation—not segregation.

"that any school official of the [suburban school districts] acted to lure white families or to discourage black families from moving into their districts." *Id.*, J.A. A-753; see also *id.*, J.A. A-754 ("none of the [suburban school district defendants] did or failed to do anything which has any significant effect on residential patterns in the Kansas City [metropolitan area]"). In addition, with respect to the state and federal defendants, the district court opinion "effectively foreclose[d] findings of interdistrict effect . . . flowing from [any] constitutional violations with respect to housing that may have occurred in KCMSD." *Jenkins II*, 807 F.2d at 677.[4] The Eighth Circuit affirmed the district court's conclusion that there was no interdistrict liability on the part of the State or any other defendant. *Id.* at 671.

3. Subsequently, the district court held the KCMSD and the State liable for an *intra*district violation within the KCMSD. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984) ("*Jenkins I*"). Although the KCMSD had eliminated all entirely white schools in 1977 and by 1984 had reduced significantly the number of schools with a high concentration of minority students, *id.* at 1493, the district court found that "the District did not and has not entirely dismantled the dual school system" because "[v]estiges of that dual system still remain." *Id.*[5] The *sole* vestige that the district court identified in

[4] In fact, the district court found no evidence of conduct by the State, with respect to housing or otherwise, that would support interdistrict liability. *Jenkins* v. *Missouri*, 807 F.2d 657, 672 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) ("*Jenkins II*"); *see id.* at 677 n.26 ("[t]here simply is no evidence in the record in this case that official housing discrimination caused school segregation").

[5] The KCMSD had stipulated that it had not achieved unitary status prior to 1977. *Jenkins I*, 593 F. Supp. at 1489.

the liability order was the KCMSD's maintenance of 24 "racially isolated" schools. *Id.*

With respect to the State's liability, the district court again rejected plaintiffs' claims that Missouri had fostered residential segregation. *Id.* at 1502-03. Specifically, it found no constitutional violation in the operation of the Missouri Housing Development Commission or any "evidence whatsoever that the state agencies exercised coercive power or significantly encouraged [private discrimination]" in the areas of real estate, financing, insurance, and public accommodations. *Id.* at 1503. The court also concluded that there was "nothing in the [State's] location of the highways nor in the operation of [the Missouri Department of Highway and Transportation's] relocation program which amounted to a constitutional violation" for which the State of Missouri would be liable. *Id.* at 1502.[6]

The district court had already made clear that school districts in Missouri "are more autonomous than those discussed in *Milliken* and numerous other desegregation cases." Order of June 5, 1984, J.A. A-727; see *id.*, J.A. A-730-31 (Missouri school districts are governed by local boards of education responsible for all aspects of operations). In particular, "[e]stablishment of school district boundaries is a local matter in Missouri, and . . . each of the boundaries of the school districts" in the Kansas City metropolitan area was "established through local initiatives, with no taint of any racial animus." *Id.*, J.A. A-729.[7] Similarly, with respect to the issue of interdistrict

[6] The district court also found that the State had undertaken substantial efforts to assist formerly segregated districts, including the provision of financial aid. 593 F. Supp. at 1495.

[7] The only state role in the establishment of school districts involved a modification in 1909 of a state law governing the point at which a city's population growth would require the creation of a single city-wide school district. Order of June 5, 1984, J.A. A-746. The State increased this ceiling from 300,000 to 500,000,

transfers, the district court found that the question of "whether to educate their black students, if any, at schools within the district or to transfer them to schools in another district" was "solely a matter of local control and within the discretion of the local school district." *Id.*, J.A. A-731, 735.

In sum, the State's liability—as opposed to the KCMSD's liability—for any "vestiges" of *de jure* intradistrict segregation was premised almost exclusively on the existence of the pre-1954 *de jure* dual school system. *Jenkins I*, 593 F. Supp. at 1500-05. Nevertheless, the district court concluded that the State was liable, along with the KCMSD, for the remaining "vestiges" of *de jure* segregation because "the State as a collective entity cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system." *Id.* at 1505.[8]

B. The Remedial Orders.

1. The court ordered the parties to submit remedial plans. *Id.* at 1506. The KCMSD's initial plan proposed consolidation of the KCMSD with the suburban school

but there was "no evidence" that the change was made "for racial reasons." *Id.*

[8] The State conceded that the Missouri constitution and statutes had required segregated schools before 1954. *Jenkins I*, 593 F. Supp. at 1490. However, the statutes enforcing that shameful episode of the State's history had been repealed by 1957, and shortly after *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*"Brown I"*), the Missouri Attorney General declared the constitutional provision and statutes void and unenforceable. Although the state constitutional provision was not formally excised until 1976, the district court did not find any State-imposed impediment to desegregation after 1954. *Jenkins I*, 593 F. Supp. at 1504-05.

The State did not appeal the decision that it, together with the KCMSD, was liable for the intradistrict violation, and that holding is not challenged here. The Eighth Circuit upheld the denial of interdistrict liability. *Jenkins II*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

districts that had previously been dismissed, forming one massive metropolitan school district. See KCMSD Plan, Doc. No. 1046, at 9-14 (Jan. 18, 1985). However, because the district court had found no interdistrict violation, it rejected this plan and required the KCMSD to prepare an amended plan "to be implemented within the existing boundaries" of the KCMSD. Order of Jan. 25, 1985, at 3.

On June 14, 1985, the district court issued its original remedial order. *Jenkins II*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). Despite the fact that the court previously had identified certain racially "isolated" schools as the only vestige of *de jure* segregation within the KCMSD, the court nevertheless held that a principal goal of the remedial order would be to "improve the educational quality" of the KCMSD. *Id.* at 24. The court rationalized this expansion of remedial authority by making a finding that "[s]egregation has caused a system wide reduction in student achievement in the schools of the KCMSD." *Id.* (emphasis deleted).

The district court, however, came to this conclusion about the effect of *de jure* segregation in the KCMSD without making any specific findings about the extent to which student achievement (on the part of minority or non-minority students) had been "reduced" or the extent to which such "reduction" was attributable to segregation, as opposed to other factors. The district court similarly made no effort to reconcile its conclusion with the fact that a substantial number of students within the KCMSD were not minority students and hence had suffered no constitutional injury. Finally, the district court made no findings concerning the particular level of student achievement that would have to be reached to remedy this supposed "vestige."

2. The remedial order ordained—and required the State to fund—a panoply of new programs designed to

ensure "quality education." First, the district court ordered that the KCMSD be restored to a AAA classification, the highest classification for school districts awarded by the State Board of Education at that time. To achieve this system-wide objective, the court directed the hiring of 22 additional librarians, 54 additional teachers in the areas of art, music, and physical education, and additional teacher aides and counselors, as well as the acquisition of additional library and media resources.

Second, the district court ordered a district-wide reduction in class size in order to obtain a teacher-to-student ratio below the level needed for AAA standing. Initially, this resulted in the hiring of 183 additional teachers. Third, the district court ordered implementation of a variety of new programs to expand educational opportunities for KCMSD students. These included Full-Day Kindergarten; expanded summer school programs; a before- and after-school tutoring program (now called the Extended Day program); and an early childhood development program. *Jenkins II*, 639 F. Supp. at 30-33. The district court also ordered a system-wide "Effective Schools" cash grants program with a stated goal of improving students' standardized test scores. *Id.* at 34. The Effective Schools program has required the expenditure of more than $51 million through the 1993-94 school year. Missouri Dep't of Elementary and Secondary Educ., *KCMSD Total Desegregation Program Expenditures* (Sept. 30, 1994) ("*Desegregation Expenditures*").[9]

---

[9] The vast majority of these educational programs—referred to as the "quality education" programs—have continued with minor modifications to the present day. *See* Orders of June 16, 1986 (J.A. A-102-24); July 6, 1987 (*id.* A-194-211); July 25, 1988 (*id.* A-245-76); July 5, 1989 (*id.* A-277-310); Apr. 23, 1990 (*id.* A-311-16); June 26, 1990 (*id.* A-323-31); July 5, 1991 (*id.* A-354-74); June 17, 1992 (*id.* A-69-75); and July 30, 1993 (*id.* A-110-21). These programs go far beyond the scope of the remedial measures identified in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"), because they are not targeted at providing educational opportunities to minority students who were directly disadvantaged by

Taken together, the "quality education" programs, which began in the 1985-86 school year, now cost Missouri taxpayers approximately $54 million in a typical year. To date, the cost of implementing the quality education programs alone amounts to more than $220 million. There has never been any suggestion in the decade since these remedies were imposed that the State has done anything other than comply fully with the district court's decrees by funding the ordered amounts.

3. The original quality education programs constituted only the beginning of the vast and comprehensive remedy ordered by the district court and affirmed by the dedicated panel of the Eighth Circuit, a remedy that has expanded at the urging of the student plaintiffs and the KCMSD. In addition to the quality education programs, the district court imposed a sweeping multi-theme magnet schools plan, under which *every* senior high school, *every* middle school, and approximately two-thirds of the elementary schools were converted into magnet schools aimed at providing "a greater educational opportunity to *all* KCMSD students." Order of Nov. 12, 1986, J.A. A-131.

These magnet schools include a $32 million dual-theme high school for computer and classical Greek education, containing, *inter alia*, massive computer resources, a field house with an indoor track, basketball and handball courts, a dedicated gymnastics and wrestling room, a weight-training room, and an Olympic-size swimming pool in a 400-seat natatorium, Mot. for Approval of Long-Range Capital Improvement Plan with Mem. by KCMSD, Doc. No. 1271 (Feb. 26, 1987); an agricultural school, including a working farm area, live farm animals, and a greenhouse, *id.*; a technical vocational school offering extensive technological programs such as laser technology, optics, and robotics, Mot. for Approval of Long-

de jure segregation. Instead, the "quality education" programs in this case are designed to improve academic performance across the board for all KCMSD students.

Range Magnet School Plan, Doc. No. 1211 (Aug. 13, 1986) ("Doc. No. 1211"); and an aquaculture facility. Desegregation Monitoring Comm. Rep. (Sept. 20, 1994). Many of the programs include field trips across the United States and to foreign countries, all of which are completely paid for by court-ordered desegregation funding. Doc. No. 1211, *supra*. To date, the magnet programs have cost $317 million, and magnet transportation has added to that figure an additional $131.7 million. *Desegregation Expenditures, supra* p. 9.[10]

The district court found that the deterioration in the physical plant of certain KCMSD facilities "[u]nquestionably" was due to "deferred maintenance by the KCMSD." *Jenkins* v. *Missouri*, 672 F. Supp. 400, 403 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988) ("*Jenkins III*"). The court concluded, however, that the failure of the State "to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere" that encouraged such conduct by the KCMSD. *Jenkins III*, 672 F. Supp. at 403. The court therefore imposed upon the State a sweeping capital improvements plan designed to achieve "suburban comparability" in KCMSD facilities. *Id.* at 404; see also *Missouri* v. *Jenkins*, 495 U.S. 33, 77, 80 (1990) (Kennedy, J., concurring in part and concurring in judgment) (outlining contours of the "extraordinary" remedy ordered by the district court); *Jenkins III*, 855 F.2d 1295 (8th Cir. 1988); *Jenkins* v. *Missouri*, 931 F.2d 470, 481 (8th Cir.), *cert. denied*, 112 S. Ct. 437 (1991) ("*Jenkins IV*"). This imposition of liability demonstrated the court's previously announced conviction that the "argument that

[10] Presently before the district court is a proposal to have the State fund a study for a further expansion of the magnet program that would establish high school programs in area community colleges, with attendance open to both KCMSD and suburban students. J.A. A-713-19. Because the proposed program is being mischaracterized as a "voluntary" interdistrict transfer plan, the State would be required fully to fund this as well. *See infra* p. 14 & note 13.

the present condition of the facilities [in the KCMSD] is not traceable to unlawful segregation is irrelevant." *Jenkins II*, 639 F. Supp. 19, 40 (W.D. Mo. 1985). As of 1990, over $260 million in capital improvements had been ordered. *Missouri* v. *Jenkins*, 495 U.S. at 61. The total ordered for these improvements has now risen to approximately $544 million, and more requests are forthcoming. See KCMSD First Report to the Ct. on Status of Magnet, Capital and Fin. Planning at 11 (Sept. 15, 1994).

In approving the second-year budget for the "quality education" programs and the magnet schools, the district court stated that its "long term goal . . . is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Order of June 16, 1986, J.A. A-118-19. This expressed goal of "suburban comparability" is intended not only to "restore[]" the position of "victims of unconstitutional segregation," but also to "establish[] an environment designed to maintain and attract non-minority enrollment." *Id.*, J.A. A-119. For example, the district court stated that its purpose in imposing the lavish magnet school program was to make the KCMSD so attractive to "non-minority students from the suburbs" that they would be "draw[n] in" to the KCMSD. Order of Nov. 12, 1986, J.A. A-132. The court also "believe[d] that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD." *Id.* Not surprisingly, the district court recently concluded that its enormously expensive court-ordered "quality education" program "provide[d] the KCMSD with facilities and opportunities *not available anywhere else in the country.*" Pet. App. A-115 (emphasis added).

4. In addition to the facilities, resources, and capital expenditures noted above, the district court also has required extraordinary salary assistance to KCMSD em-

ployees. See, *e.g.*, *Jenkins III*, 672 F. Supp. at 410 (ordering over $7 million for additional teachers and salary increases over the next five years). Both the salary increases ordered by the courts and the types of employees receiving court-ordered increases have expanded during the course of implementation of the remedy. Initially, the KCMSD requested salary relief solely for teachers on the ground that the district's "salary position . . . has deteriorated significantly in recent years, since KCMSD has not been able to obtain passage of a tax levy to fund raises." Motion for Further Funding Relief, Doc. No. 1326 (May 8, 1987); see Attachment 1 to Mot., Decl. of Roger N. Gaunt ¶ 38.

In 1990, however, the student plaintiffs and the KCMSD—together with an intervenor, the American Federation of Teachers, Local 691—proposed further expansion of salary funding to cover salary increases to non-instructional personnel. The State contested each of these proposals because the salary increases were not desegregation-related and the purpose of the requests was to subvert the normal bargaining process, substituting the court as the decision-maker. After several days of hearings, but before the State had presented its case, the district court made clear that it favored the movants' salary increase proposals. See Trial Tr., June 20, 1990, at 659-61.[11]

Recognizing the clear import of the court's message, the State agreed to a compromise for a two-year period, which the district court approved. Order of July 23, 1990, J.A. A-332-37. In 1992, at another joint request of the KCMSD and the union, the district court again

---

[11] One of the traditional *Green* factors in implementing an intra-district remedy is the racial composition of faculty and staff. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 436 (1968). Symptomatic of the district court's misdirected focus on "quality"—as opposed to equality—is a lack of any finding that these extraordinary salary increases improve racial balance in the hiring and retention of faculty and staff in the KCMSD.

extended and increased its salary orders. The court explicitly grounded these extraordinary salary increases on its "desegregative attractiveness" rationale. Pet. App. A-90.

In 1993, the plaintiffs, the KCMSD, and the union sought to expand salary funding even further. Once again, the district court approved these requests over the same objections by the State, stating that KCMSD salaries should be competitive with the "national urban market." *Id.* A-96-97. Currently, all but three of the approximately 5,000 KCMSD employees have received increased salaries from court-ordered desegregation funds. The total cost of the salary component of the remedy since 1987 is $201 million. *Desegregation Expenditures, supra* p. 9.

5. Although the violation underlying the KCMSD remedial orders is solely *intra*district in scope, the district court's remedial orders from the outset have embraced a broader purpose: to promote *inter*district integration. The district court—with the consistent encouragement of the dedicated Eighth Circuit panel—repeatedly has required the State to propose State-funded interdistrict transfer plans and to inquire into the willingness of suburban districts to accept KCMSD students. See Orders of June 14, 1985, J.A. A-86-88; June 16, 1986, J.A. A-112-14.[12] See also Order of May 14, 1990, J.A. A-317-22.[13]

[12] The district court has warned the State that if it does not "demonstrate that [it is] seriously committed to seeking the cooperation of each suburban school district in the Kansas City, Missouri metropolitan area," "this Court will seek other methods of accomplishing this task at the State's expense." Order of June 16, 1986, J.A. A-114. In 1992, the Eighth Circuit panel suggested that implementation of a large scale, State-funded, "voluntary" interdistrict transfer plan is an essential precondition to unitary status. *Jenkins* v. *Missouri*, 981 F.2d 1009, 1016 (8th Cir. 1992) ("*Jenkins V*").

[13] At one point, the court of appeals stated that "a voluntary interdistrict program is one that has great potential for improving the racial balance *in the Kansas City area.*" *Jenkins II*, 807 F.2d 657, 683 n.30 (8th Cir. 1986) (emphasis added), *cert. denied*, 484 U.S. 816 (1987). That court further opined that the suburban districts—which already had been dismissed from the litigation—could be found in violation of the Fourteenth Amendment for not agreeing to participate in a "voluntary" plan. *Id.*

Most recently, the Eighth Circuit panel, in affirming the rejection of a "voluntary" plan contrived by plaintiffs and the beneficiary school district—at an initial cost to the State of $14,000 per student—stated "more must be done either by way of further inducements to the suburban districts, or in more coercive actions that the State is empowered to take." *Jenkins* v. *Missouri*, No. 94-1405, slip op. at 15 (8th Cir. Oct. 13, 1994) ("*Jenkins VI*"). The panel made clear that a lack of demonstrated results from a "voluntary" interdistrict transfer plan could subject the State to more "coercive remedial measures." *Id.*

C. The Decisions Under Review.

1. Following this Court's decisions in *Board of Education* v. *Dowell*, 498 U.S. 237 (1991), and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), the State of Missouri sought a declaration of partial unitary status with regard to the "quality education" programs. The State maintained that, as to those programs, it had satisfied the district court's "suburban comparability" standard. The State demonstrated that measures taken by the KCMSD and the State had provided programs that met, and in many cases exceeded, the educational opportunities "available in all of the suburban school districts in almost every area of classification" examined by the Missouri Department of Elementary and Secondary Education. J.A. A-452 (testimony of Dr. Terrance Stewart).

Despite the State's uncontroverted evidence and the district court's later finding that its "suburban comparability" standard had been surpassed, Pet. App. A-115, the district court, without comment or findings, implicitly re-

jected the State's request for partial unitary status by ordering continued funding of the programs. *Id.* A-69.

2. Notwithstanding the acknowledged lack of factual findings to support the district court's order, the dedicated Eighth Circuit panel affirmed. In so doing, the panel held that unitary status in the area of quality education could not be measured solely by the "implementation of programs" providing equal opportunity. *Id.* A-20-21. The court went further, indicating that the test for unitary status would be some unspecified improvement in KCMSD student achievement. The panel stated:

> The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools . . . .

Id. According to the panel, such a "student achievement" standard was required by the "goals of the remedial programs," which were:

> to improve the educational lot of the victims of unconstitutional segregation, to regain some portion of the white students who have fled the District and retain those that are still there, and to redistribute the students within the KCMSD to achieve the maximum desegregation possible.

Id. A-24 (citing *Jenkins III*, 855 F.2d 1295, 1302 (8th Cir. 1988)).

The dedicated panel also upheld the order granting across-the-board salary increases to virtually all KCMSD employees. *Id.* A-35. These court-ordered salary increases covered not only teachers and administrators, but also non-instructional employees such as cooks, custodians, and clerical workers.[14]

[14] The dedicated panel affirmed the 1992 salary order in its opinion of November 29, 1993, Pet. App. A-1-27, and the 1993 order in its separate opinion of December 8, 1993. *Id.* A-28.

3. In an opinion concurring in the Eighth Circuit's 6-5 decision to deny rehearing *en banc*, Senior Circuit Judge John Gibson and Judge McMillian, both members of the dedicated panel, affirmed that test scores would be used to measure success in "student achievement": "When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered." *Id.* A-48. The concurring opinion stated that test scores would be only one "factor in the equation" in determining partial unitary status. *Id.* The nature and identity of the other "factors" were, however, left unspecified.

In fact, as five members of the court dissenting from the denial of rehearing *en banc* pointed out, improvement in standardized test scores was the *only factor* lacking in the implementation of the quality education program:

> The only factor the District Court saw standing in the way of unitary status for the educational program was continued below-average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the educational enhancement . . . program of the KCMSD is wanting.

Id. A-61 (internal citations omitted).[15] According to the dissent, by "imbedd[ing] a student achievement goal

[15] The dissent noted, for example, that per-pupil costs in the KCMSD were more than double those in some of the suburban school districts. Pet. App. A-56 (KCMSD per-pupil costs were $9,412 per pupil, excluding capital costs, or $13,500 per student, including capital costs; the comparable figures for the suburban districts were $2,854 to $5,956 per pupil, excluding capital costs, or $4,192 to $7,488 per pupil, including capital costs). The dissent also noted the State's prompt compliance with the district court's specific orders: "In every instance, the enhancement of resources and program improvements ordered by the district court had been implemented and were in place no later than the 1988-1989 school year. Most of them predated that school year." *Id.* A-61. Even the KCMSD's Superintendent agreed that the necessary "quality education" resources were in place and that the only hurdle to

measured by annual standardized tests into its test of whether the KCMSD has built a high quality educational system," the court had "create[d] a hurdle to the withdrawal of judicial intervention from public education that has no support in the law." *Id.* A-58. The five dissenting judges also held that salary increases for non-instructional personnel were beyond the scope of any legitimate remedial goal. *Id.* A-57.

4. Prior to the grant of *certiorari* by this Court, the district court again rejected the State's argument that it was entitled to a declaration of unitary status with respect to the quality education programs. *Id.* A-110-21 (approving "quality education" budget requests for 1993-94 and 1994-95 school years). In affirming the district court's order, the dedicated panel once again expanded the scope of the remedy, holding that unitary status for the "quality education" component of the plan would not be granted until the State could demonstrate a plan to provide *permanent* funding for such programs. J.A. A-578-88.

SUMMARY OF ARGUMENT

I. This case poses two specific remedial questions. First, does a federal court in an intradistrict desegregation case have remedial authority to require district-wide improvement in student achievement—as measured by national averages or other standards—before that district can be declared unitary. Second, does a federal court in such a case have remedial authority to order across-the-board salary increases for all school district employees, even if there is no evidence that such salary increases reasonably promote desegregation within the school system.

A. Although each question can be dealt with on its own terms, both are inextricably connected to the more funda-

---

unitary status was that KCMSD students reach the "national norm, the 50th percentile" in achievement on standardized tests. *Id.* A-62 (quoting testimony).

mental issue of the propriety of the ultimate remedial purpose of the Kansas City desegregation decree, decades after the end of *de jure* segregation. The principles that govern here are well settled. The object of remedial orders in the school desegregation context is the elimination of unconstitutional *de jure* school systems. *Milliken* v. *Bradley*, 418 U.S. 717, 737 (1974) ("*Milliken I*"). Desegregation remedies must be focused on those conditions or aspects of school operations that offend the Constitution; thus, any remedy directed to a condition that does not violate the Constitution or does not flow from such a violation exceeds appropriate limits. *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977) ("*Milliken II*"); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Such limits are "tied to the necessity of establishing that school authorities have in some manner caused" the unconstitutional condition that is the subject of the court's remedial order. *Spangler*, 427 U.S. at 434.

In the course of this protracted litigation, the courts below have lost sight of the goal of eliminating one-race schools, instead converting the remedial phase of this case into an exercise in providing the best (and most expensive) school system that the State's money can purchase. There is no question that increases in the "quality" of education in the Kansas City schools theoretically *could* promote integration, in the sense that superior quality schools might further the goal of attracting additional non-minority students from the suburbs or private academies. But that goal is inherently *inter*district in nature, and this case is, and always has been, an *intra*district case. This fundamental departure from legitimate remedial goals has caused the lower courts to pursue a course that is inherently misguided and in excess of any appropriate measure of their remedial authority.

B. The best indication that this case has strayed off the proper remedial course is the complete absence of any

meaningful discussion in the decisions below of the relevant criteria for determining whether the Kansas City school system has become unitary. In a typical intra-district case, see, *e.g.*, *Freeman* v. *Pitts,* 112 S. Ct. 1430 (1992), the remedial analysis focuses on the so-called "*Green* factors," *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968), which this Court has identified as the measure of whether a school district has racially identifiable schools. If schools within a district are as racially indistinct as practicable; if the schools' faculties and staffs are similarly diverse; and if the schools both have similar physical appearances and offer similar means of transportation and equal availability of extracurricular activities, then under this Court's decisions, the school district will be held to have eliminated the vestiges of its prior *de jure* system. As soon as those objectives have been achieved as far as practicable, and the government officials involved have demonstrated a commitment to fulfilling their constitutional obligations, then federal court supervision must be terminated. *Board of Educ.* v. *Dowell,* 498 U.S. 237, 248-49 (1991).

The well settled approach of *Green* makes no provision for comparing overall "student achievement" standards within the KCMSD to some national (or even suburban) standard or to some unstated level of improvement. Similarly, there is no basis for comparing staff salary levels in the KCMSD to suburban, regional, or national norms. Instead, under the traditional *Green* factors, the remedial goal is focused on the elimination of racially identifiable schools to achieve *equality* within the district, not an effort to improve *quality* measured against standards derived either inside or outside the district. See *Freeman,* 112 S. Ct. 1430; *Dowell,* 498 U.S. 237; *Spangler,* 427 U.S. 424; *Green,* 391 U.S. 430.

C. The courts below have employed two flawed rationales—both of which arise out of mistaken assumptions about what constitute "vestiges" of *de jure* segregation—

to escape the constraints of the *Green* factors and vastly expand their remedial efforts. First, the district court augmented its original liability findings to include a "finding" that "white flight" was a vestige of *de jure* segregation. Because the court lacked authority to order inter-district transfers, it adopted the novel approach of making the school system so attractive that non-minority students would be drawn from the suburban and private schools. Such a faculty rationale could, however, justify *any* action—including mandated improvement in test scores or across-the-board salary increases—that might be said to improve the school district. To be sure, to the extent such efforts make a school district more attractive to white students, they could thereby promote integration. But they exceed by far what is proper to remedy the constitutional violation.

Second, the court held that *overall* student achievement was harmed by *de jure* segregation. Based on this assumption—itself not supported by the record—the court concluded that it could order remedies designed to upgrade achievement system-wide. The court made no findings tying its decision to the existence of racially identifiable schools. Under such a rationale, the court clearly would deny unitary status solely because achievement test scores for black *and* white students remained below suburban or national norms or some other unspecified level of achievement.

The flaw common to both of these arguments is that the conditions in question simply are not vestiges of the former constitutional violation. "White flight" to the suburbs is not a vestige of *de jure* segregation. To the contrary, "white flight" is a regrettable consequence of desegregation, and the record and findings in this case—like the record in many other jurisdictions around the country—make clear that the departure of non-minority students did not occur until the KCMSD began to dismantle *de jure* segregation.

Similarly, although at one point in time, *de jure* segregation deprived minority and non-minority students of the cultural richness of a diverse educational environment, the district court failed to find a causal link between that segregation and current system-wide achievement levels, especially in light of the many external factors that affect achievement. There is certainly no reason to conclude that *de jure* segregation of decades ago is the cause of "reduced" test scores by *non*-minority students today. Even though school systems can be required to provide special remedial programs (*e.g.*, "quality education") to students directly harmed by racial segregation, *Milliken II*, 433 U.S. 267 (1977), such authority cannot be expanded into a federal judicial mandate to "provide the KCMSD with facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

II. Even if "suburban comparability" in test scores and "desegregative attractiveness" were legitimate remedial goals, the courts below exceeded the proper scope of their remedial authority by mandating a particular measure of educational success or outcome; the only legitimate goal is equal educational opportunity. It simply is beyond the scope of the constitutional authority of the courts below to erect actual achievement as the benchmark of a successful remedial program. It is also beyond the scope of those courts' authority to require across-the-board salary increases in the absence of any showing of a link between such increases and the courts' flawed rationale of "desegregative attractiveness."

The lower courts' expansive intrusions into the management of a local school district thus are constitutionally unauthorized, and they are detrimental to the independence of a State and its school districts in our federal system. This Court should make clear that the *Green* factors' focus on identifiable and reasonably measurable aspects of the school system itself provides the appropriate test for determining whether the core purpose of the desegregation remedy—removal of the dual school system

and its "inherent" vestiges—has been achieved. Because the orders under review cannot be squared with these fundamental principles, they should be set aside.

ARGUMENT

I. THE COURT-ORDERED SYSTEM-WIDE ACHIEVEMENT REQUIREMENTS AND ACROSS-THE-BOARD SALARY INCREASES CONSTITUTE A REMEDY THAT VASTLY EXCEEDS THE ONLY LEGITIMATE GOAL OF AN INTRADISTRICT DESEGREGATION PLAN: TO UNDO THE VESTIGES OF *DE JURE* SEGREGATION IN THE KANSAS CITY, MISSOURI, SCHOOL DISTRICT.

Despite the undeniable importance of "eliminat[ing] from the public schools all vestiges of state-imposed segregation," the use of federal judicial power to achieve that objective necessarily is constrained by the limits of the Fourteenth Amendment itself. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14-15 (1971). Where, as here, remedial orders exceed what is appropriate to remedy a condition actually caused by prior unconstitutional conduct, such orders must be reversed. *Milliken I*, 418 U.S. 717 (1974).

A. Federal Judicial Authority To Remedy Racial Imbalance Is Limited To The Scope Of The Prior Unconstitutional Conduct.

The limits of federal authority to remedy *de jure* segregation in local school systems are defined by the unconstitutional conditions that gave rise to such authority in the first instance. "The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils." *Id.* at 737. The sole purpose of a desegregation remedy is to "correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 16.

Therefore, in formulating an appropriate remedy, "the nature of the violation determines the scope of the remedy." *Id.*; see *Milliken II*, 433 U.S. 267 (1977). "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id.* at 282; see *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (desegregation remedy must focus on the "incremental segregative effect" of specific constitutional violation); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976); *Milliken I*, 418 U.S. at 736. And the causal link cannot be abstract; the remedy must be tied, in a "realistic sense," to the "injury suffered." *Richmond* v. *J.A. Croson*, 488 U.S. 469, 499 (1989). Thus, in *Milliken I*, 418 U.S. at 752, this Court held that findings of *de jure* segregation within the Detroit school district could not justify an interdistrict remedy mandating racial balance in school assignments that included numerous outlying districts. *Id.* Because the remedy exceeded the extent of the violation, it was found to be in excess of the court's authority under the Fourteenth Amendment. *Id.*

In addition to limits imposed directly by the nature of the violation, as in *Milliken I*, a federal court's authority is constrained by core notions of federalism, including the recognition that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems." *Brown* v. *Board of Educ.*, 349 U.S. 294, 299 (1955) ("*Brown II*") (emphasis added); see *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991). This Court's holdings thus make clear that desegregation decrees are temporary, and that school districts must be returned to the control of state and local authorities as soon as they are operating in compliance with the Constitution. "As [this Court has] long observed, 'local autonomy of school districts is a vital national tradition.'" *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1445 (1992) (quoting *Dayton*, 433 U.S. at 410); see also *Dowell*, 498 U.S.

at 248 (discussing "the important values of local control of public school systems").

Thus, in analyzing the proper scope of a remedial order designed to cure "vestiges" of a dual school system, the lower courts must consider the legitimate "interest of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81; see *Spangler*, 427 U.S. at 436-37 (rejecting plan that would "ensure that the racial mix desired by the court was maintained *in perpetuity*") (emphasis added). In accordance with these principles, this Court has warned against "open-ended" remedies that go beyond the elimination of conditions directly *caused* by *de jure* segregation:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract . . . continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.

Freeman, 112 S. Ct. at 1448. Because demographic shifts in population primarily reflect private decision-making, the remedial order in *Freeman*, which attempted to counteract those shifts, improperly ignored "the necessity of establishing that school authorities have in some manner *caused* unconstitutional segregation." *Spangler*, 427 U.S. at 434 (emphasis added).

In sum, limits imposed by our system of federalism require federal courts to recognize that they are neither authorized nor equipped to perform the uniquely local functions of a school board. The KCMSD remedy, which "uses the quality of education as a lure to attract nonminority students[,] will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities." *Missouri* v. *Jenkins*, 495 U.S. 33, 76 (1990) (Kennedy, J. concurring in judgment and concurring in part). State

and local governments cannot optimally perform their function of educating children when every decision is scrutinized exclusively against "a rigid rule erecting race as the sole criterion." *J.A. Croson*, 488 U.S. at 493.[16] As the Fifth Circuit recognized in similar circumstances:

> accommodation of federal superintendence and federalism will not tolerate the idea that although the wrong is righted, the magnitude of the past wrong nonetheless justifies perpetuation of a federal order limiting the ambit of a school district's self-governance.

United States v. *Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987). For these reasons, once *de jure* segregation has been disestablished and its effects have disappeared, courts may not contrive new duties designed to address broader societal goals, with the effect of perpetuating federal control over this essentially local function.

It is by reference to the mandate to eliminate racially identifiable schools that the State's actions must be measured. It is beyond federal authority to require the State of Missouri to remedy conditions in the Kansas City school district that are caused by such factors as private decision-making, local economics, or local demographics. See *Spangler*, 427 U.S. at 435-36. The propriety of the remedial orders in this case should be judged by the controlling principle consistently expounded by this Court that the scope of the remedy is limited by the nature and extent of the constitutional violation. *Milliken I*, 418 U.S. 744.

---

[16] The KCMSD, with about 4.3% of the State's students (Missouri Dep't of Elementary and Secondary Educ. Census Report, Oct. 1993), receives 8.46% of all funds distributed through the State's statutory school finance formula (Executive Budget, State of Missouri, Fiscal 1995). Adding current appropriations for court-mandated desegregation remedies raises the KCMSD share to 23%. *Id.* The KCMSD may well seek to retain that share by acceding to continued judicial supervision. *See* Pet. App. A-62 (KCMSD Administrator endorsing a 100-year remedy).

B. The Courts Below Acted Beyond Their Constitutional Authority In Imposing An Interdistrict Remedy To Cure An Intradistrict Violation.

The remedy imposed by the lower courts, which seeks to cure conditions unrelated to past segregation, oversteps the well established purpose of such remedial decrees: to eliminate current effects or conditions "inherent in . . . dual school systems."[17] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971). A desegregation remedy may *not* "embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." *Id.* at 23. "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities." *Id.* at 22.

1. There can be no question that this case involves no *inter*district violation. See Order of June 5, 1984, J.A. A-721-820. Plaintiffs' claims for interdistrict relief were rejected due to a "[l]ack of proof of discriminatory intent in the establishment or changing of any school district boundary lines." *Id.*, J.A. A-726. The district court also found the autonomy of Missouri school districts to be a reason to deny interdistrict relief:

> Having reviewed hundreds of minutes from various boards of education in this case, the Court is fully convinced, and hereby finds, that each of the school districts is a locally autonomous and independent

---

[17] This Court in 1990 expressly declined either to approve or disapprove the unique scope and purpose of the remedy in this case (although four members of the Court expressed doubt as to whether the "extraordinary" scope and purpose of the remedy were constitutionally required). *Missouri* v. *Jenkins*, 495 U.S. 33, 76-80 (1990). Because the orders at issue are inseparable products of the lower courts' unfounded remedy, the Court is free to examine whether the remedy has now exceeded the "undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases." *Milliken I*, 418 U.S. 717, 736 (1974) (White, J., dissenting).

> entity. Because each defendant district is independent and autonomous from the state of Missouri, and from all other school districts, none has an affirmative duty to merge with other districts. . . . And, absent a finding of interdistrict constitutional violation, none can be made a part of an interdistrict remedy.

Id., J.A. A-731-32. The theory that an interdistrict remedy could be supported by interdistrict "effects" likewise was properly rejected. *Id.*, J.A. A-725. The court of appeals, sitting *en banc*, held these "specific findings . . . negate current significant interdistrict efforts." *Jenkins II*, 807 F.2d 657, 672 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). In short, no evidence in this case would support an interdistrict remedy under the guidelines of *Milliken I*, and the district court correctly refused to grant such relief.[18]

2. Where, as here, the violation at issue is intradistrict in nature, this Court has identified six facets of school operations to guide federal courts in their task of con-

[18] The Eighth Circuit has used *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), to justify the imposition of an interdistrict remedy despite the lack of interdistrict liability. *See Liddell* v. *Missouri*, 731 F.2d 1294 (8th Cir. 1984) (citing *Jenkins II*, 807 F.2d at 682-83). *Gautreaux*, however, does not support the interdistrict features of the remedy here. In *Gautreaux*, the Court considered the scope of a remedy against the United States Department of Housing and Urban Development ("HUD") for discrimination in public housing in Chicago. Although the discrimination occurred in the City of Chicago, the Court found that *Milliken I* did not preclude an order against HUD that would affect its conduct in the surrounding metropolitan area because—unlike the situation in *Milliken I*—HUD had established a black enclave in Chicago; the remedy involved no coercion of uninvolved governmental units; and HUD had plenary authority to act extraterritorially. 425 U.S. at 297-99 & n.14. Here, the district court's findings negate any notion that the State has any significant authority over the local autonomous districts. Moreover, in *Gautreaux*, there was evidence of suburban discrimination and of the "'extra-city impact of [HUD's]' intracity discrimination," *id.* at 284—precisely the opposite of what the district court found here.

torming desegregation remedies to the underlying constitutional violation. See *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968). These so-called "*Green* factors"—student assignment, faculty, staff, transportation, extracurricular activities, and facilities—bear on the central question of whether any vestiges of the dual school system exist within the district in question. *Id.* at 435. This Court repeatedly has applied these factors and underscored their importance. See, *e.g.*, *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 ("*Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*"); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971) ("existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities [are] among the most important indicia of a segregated system"); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196 (1973); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 250 (1991).

The application of the *Green* factors as a remedial yardstick ensures a close fit between the ongoing remedy and the original constitutional violation. Thus, in *Spangler*, this Court held that where an earlier remedial order had "established a racially neutral system" with respect to the *Green* factor of student assignment, 427 U.S. at 434, the district court "exceeded its authority" in continuing to "require annual readjustment of attendance zones" to maintain racial balance in student assignment. *Id.* at 434-35. The Court disapproved that order because there was no causal link between "a constitutional violation" on the part of defendants and the "judicially order[ed] assignment of students on a racial basis." *Id.* at 434 (quoting *Swann*, 402 U.S. at 28).[19]

[19] Like the courts below, the district court in *Pasadena Board of Education* v. *Spangler* "apparently believed it had authority to impose this requirement [of racial balance in student assignment] even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." 427 U.S. 424, 434 (1976).

In light of the importance of the *Green* factors to this Court's desegregation jurisprudence, their virtual absence from the decisions below is striking. Rather than look to the distribution of resources within the KCMSD—*i.e.*, ascertain whether there are "racially identifiable" schools—the courts below consistently have defined the goals of the remedy in terms of "suburban comparability" and "desegregative attractiveness." See *infra* pp. 32-33. Because, by definition, these "goals" look beyond conditions *within* the KCMSD "assessed in light of the circumstances present and the options available in each instance," *Green*, 391 U.S. at 439, the result is a vastly overreaching remedy.

3. The fundamental flaw in the overall remedial scheme in this case is that, over time, the focus on "desegregative attractiveness" and "suburban comparability" has inexorably led to an interdistrict remedy—notwithstanding the district court's original finding that no interdistrict violation had occurred in the KCMSD.[20] The decisions below, ordering the State to expand its funding of "quality education" improvements in the KCMSD, make apparent that the lower courts have lost sight of the fact that this "school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16. Instead, the courts have created an unprecedented program that attempts "not only [to] remedy the vestiges of past segregation but also [to serve as] a means to attract and retain enrollment from non-minority

[20] For example, the enormous magnet school system was explicitly designed to "magnetize" virtually the entire district in an effort to attract suburban whites. *See* Order of Nov. 12, 1986, J.A. A-132. This element of the plan was plainly designed to pierce the territorial integrity of surrounding school districts in spite of the district court's finding of no interdistrict liability under *Milliken I*. The ultimate goal, like the approach rejected in *Milliken I*, was to make the KCMSD more closely resemble the surrounding region in its racial composition. That goal, while laudable as a matter of public policy, is plainly excessive under the Fourteenth Amendment.

families." *Jenkins II*, 639 F. Supp. 19, 32 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). The result is the erection of an *inter*district remedial plan for an *intra*district violation, a remedy that goes "beyond the original theory of the case." *Milliken I*, 418 U.S. 717, 745 (1974).

Comparing the June 1984 order denying interdistrict relief to the Eighth Circuit's October 13, 1994, opinion illustrates the extent to which the remedial plan has gone astray. In 1984, the district court held:

> [T]he KCMSD and each [suburban school district] has an obligation to provide a unitary school system in *their* respective districts. Failure to dissolve, merge, legislate, cooperate or entice blacks into their districts does not, as plaintiffs suggest, evidence a constitutional violation for which this court can mandate an interdistrict remedy. Such actions may be urged by social scientists but that does not create a constitutional duty.

Order of June 5, 1984, J.A. A-733-34. In sharp contrast, the court of appeals, ten years later, chastised the State for the failure to achieve a better racial balance between the KCMSD and the suburban districts:

> It is evident that the State's plan, no matter how reasonable, has failed to attract favorable reaction from the suburban school districts. For the plan to be successful . . . more must be done either by way of further inducements to the suburban districts, or in more coercive actions that the State is empowered to take. [I]f the State does not demonstrate its commitment, the court will seek other methods of accomplishing ["voluntary" student transfers] at the State's expense.

Jenkins VI, No. 94-1405, slip op. at 15 (8th Cir. Oct. 13, 1994) (citations omitted).

The decisions under review, like the Eighth Circuit decision quoted above, cannot be reconciled with this Court's holding in *Milliken I* that vestiges of intradistrict

de jure segregation do not support an interdistrict remedy mandating racial balance that extends to surrounding suburban districts. 418 U.S. at 752. The expansion of the lower courts' remedial "goals" to impose an interdistrict remedy in this intradistrict case requires reversal.

C. The Courts Below Acted Beyond Their Constitutional Authority In Imposing A Remedy Designed To Cure Conditions That Are Not, As A Matter Of Law, "Vestiges" Of *De Jure* Segregation.

The courts below have made clear that the "goals'" of the remedy they have constructed and are expanding go far beyond the eradication of the dual school system that was operated within the KCMSD decades ago.[21] Indeed, those courts have expressly adopted two new goals: (1) "to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district," *Jenkins II*, 639 F. Supp. at 54, and (2) to attract "non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs." *Jenkins III*, 855 F.2d 1295, 1301-03 (8th Cir. 1988).

The courts have used these goals to justify the continuing expansion of their remedial authority, asserting

[21] The district court's remedial orders repeatedly acknowledge that the goals of the remedial plan go beyond the elimination of the vestiges of *de jure* segregation: "The difficult question which remains is, which programs are appropriate to remedy the ill effects of the unconstitutional segregation *and* to attract and maintain non-minority enrollment." *Jenkins II*, 639 F. Supp. 19, 24 (W.D. Mo. 1985) (emphasis added). "Reducing class size will serve to remedy the vestiges of past segregation . . . *as well as* . . . maintaining and attracting non-minority enrollment." *Id.* at 29 (emphasis added). That the district court fundamentally misunderstood the purpose of an intradistrict remedy is clear: "To accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task." *Id.* at 88.

that the realization of these aims is necessary to remove the supposed "vestiges" of the dual school system. In particular, the district court has stated: "the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight," *id.* at 1302, and that " '[s]egregation has caused a system-wide reduction in student achievement in the schools of the KCMSD.' " *Id.* at 1300 (quoting *Jenkins II*, 639 F. Supp. at 24 (emphasis deleted)). But neither "white flight" nor a "reduction" in system-wide achievement is a true vestige of *de jure* segregation.

By mischaracterizing certain conditions as "vestiges" of segregation—and measuring the scope of remedial authority against the goals of eliminating these vestiges—the courts below have, over time, fundamentally expanded and distorted the remedial portion of this case. The State's ability to control its own budget has been usurped because the State has been judged as having failed to achieve compliance with a desegregation "plan" that lacks constitutional foundation. This limitless approach has spawned an ever-growing remedy "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant* v. *Jackson County Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion of Powell, J.).

1. The Court has never been called upon to articulate a precise standard for identifying the "vestiges" of *de jure* segregation. However, this Court's desegregation decisions make clear that a "vestige" of discrimination must be an identifiable condition or practice fairly traceable to—*i.e.*, proximately caused by—the original constitutional violation. See *Milliken II*, 433 U.S. 267, 282 (1977); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434-35 (1976). Absent such a limitation, the federal courts would be free to impose remedial plans that endure far beyond the "temporary measures" envisioned since *Brown II*. *Board of Educ.* v. *Dowell*, 498 U.S. 237, 249 (1991). Such unfettered remedial plans would, by defini-

tion, surpass "the ultimate objective" of desegregation remedies: "alleviating the initial constitutional violation." *Freeman* v. *Pitts,* 112 S. Ct. 1430, 1445 (1992).

To trace current conditions to the past *de jure* segregation, there must be an identifiable "causal link." [22] *Id.* at 1448. Because the condition being addressed must have a "*real and substantial relation* to [the] *de jure* violation" being remedied, *id.* (emphasis added), those vestiges that federal courts have a mandate to alleviate must be tangible "remnants" of the unconstitutional dual school system. Consequently, they must not only have been caused by the dual school system in a "but-for" sense, but also have been a part of that dual system. Thus, this Court has approved remedial schemes addressing such vestiges of *de jure* segregation as inferior facilities for heavily minority schools, *e.g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-19 (1971); gerrymandered attendance and transportation zones, *e.g., Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 461-62 nn.8-10 (1979); maintenance of two high schools when one could serve all students, *e.g., Green* v. *County Sch. Bd.*, 391 U.S. 430, 442 n.6 (1968); the use of mobile classrooms to prolong the existence of racially distinct facilities, *e.g., Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 192 (1973); and racially separate teacher associa-

[22] Fundamental tort-law causation principles are inherent in the notion that only those conditions that themselves "violate the Constitution" or "flow from such a violation" are properly remediable. *Milliken II*, 433 U.S. 267, 282 (1977). As Professors Prosser and Keeton have commented, "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." W. Page Keeton *et al., Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984). Yet the ripple effect of an event on human history is decidedly not the basis on which we impose tort liability, *id.*; neither should it be the basis on which federal courts may supplant local control over school districts.

tions, student councils, or athletic leagues, *e.g., Swann*, 402 U.S. at 18.[23]

This Court has made clear that for a current condition truly to be a vestige of a dual school system, it is not enough that the condition be "a sort of 'fruit of the poisonous tree' " because a federal court believes that "some of the racial imbalance that presently obtains may have resulted in some part from . . . [earlier] segregative action." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 416, 417 (1977) (disapproving holding below because "instead of tailoring a remedy commensurate to . . . specific violations, the Court of Appeals imposed a system-wide remedy going beyond their scope"). Thus, desegregation decrees are not properly designed to alter conditions or practices not "inherent in the dual school system," *Swann*, 402 U.S. at 22, such as demographic shifts resulting in disparate racial populations. See, *e.g., Spangler*, 427 U.S. at 436; *Freeman*, 112 S. Ct. at 1448. *Cf. Austin Indep. Sch. Dist.* v. *United States*, 429 U.S. 990, 994-95 (1976) (Powell, J., concurring) (criticizing attempt in desegregation decree to remedy residential segregation).

2. As this Court has observed, passage of time since the original violation makes it far less likely that the necessary causal link exists, particularly when that period is *not* characterized by the sorts of actions associated with the institution of the former dual school system. See *Dowell*, 498 U.S. at 249 (noting that original finding of *de jure* segregation had occurred 30 years earlier, injunctive relief had been entered 19 years earlier, and defendant had complied with the decree in good faith for 13 years). Accordingly, a determination of whether there is any link between the presumed "vestiges" identified by the courts below—"reduced" student achievement scores system-wide and "white flight"—and the earlier dual

[23] Not surprisingly, those conditions found to be "fairly traceable" to the original violation are tied to the *Green* factors. *See supra* pp. 28-29.

school system must take into account both the remoteness in time of these conditions to the former *de jure* school system and the intervening conduct of the State and the KCMSD. See *Freeman*, 112 S. Ct. at 1449; *Dowell*, 498 U.S. 237, 249-50 n.2 (1991).

In light of the State's limited involvement in the operation of the KCMSD, see *supra* pp. 4-7, the district court rested the State's liability principally on the pre-1954 imposition of a dual school system requirement pursuant to state law. *Jenkins I*, 593 F. Supp. 1485, 1488, 1490 (W.D. Mo. 1984). The court found, however, that the State had abandoned that unlawful requirement almost 40 years ago. *Id.* at 1490; see also Order of June 5, 1984, J.A. A-734. See *supra* note 8. As the district court correctly observed in its first decision on liability, the "fluid nature" of the movement of people in our modern society means that "acts now 30 years past have negligible present effects." *Id.*, J.A. A-813. Indeed, many of the *parents* of today's Kansas City students had not even started school at the time that the State expressly abandoned *de jure* segregation. Not one of today's students has attended school in a *de jure* dual school system.

Not only is the original violation remote in time, but the evidence also demonstrates the KCMSD's and the State's exemplary "record of compliance," *Freeman*, 112 S. Ct. at 1446, in recent decades. The State of Missouri has spent close to one billion dollars to remedy any vestiges that might have remained in the KCMSD *after* the implementation of the 1977 "6-C" intradistrict desegregation plan. The "remedy" ordered over the last 10 years, though not required—or sanctioned—by the Constitution, has been implemented in every respect by the State. It was undisputed below that the State had complied with the district court's orders requiring massive funding of over $300 million for implementation of the quality education component of the desegregation

remedy. Indeed, the district court found that the overall quality of KCMSD education programs was equal to or better than comparable programs offered in any surrounding Missouri suburban school district. See *supra* p. 12. There can be no question that "the [State has] complied in good faith with the desegregation decree since it was entered." *Dowell*, 498 U.S. at 249-50; see also *Freeman*, 112 S. Ct. at 1449 (emphasizing importance of a "history of good-faith compliance").[24]

In sum, equitable principles dictate that any identification of a "vestige" of segregation within the KCMSD must acknowledge two things. First, any direct constitutional violation ended sometime between 18 and 40 years ago. Moreover, at least since 1977, the State and the KCMSD have provided unprecedented resources to eliminate remnants of the dual school system. *See Swann*, 402 U.S. at 16.

3. The lower courts invoked "white flight" as a "vestige" justifying extraordinary measures designed to boost the "desegregative attractiveness" of the KCMSD. But both the record below and the district court's own findings make clear that "white flight" cannot, as a matter of law, be deemed a vestige of segregation. The district court did not mention "white flight" in any of its orders establishing or approving expenditures for magnet schools.[25] To the contrary, the principal finding by the district court regarding "white flight" during the rele-

---

[24] This compliance has occurred against a backdrop in which the KCMSD has for many years now "implemented a racially neutral attendance pattern." *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 436 (1976).

[25] Indeed, the "finding" to which the court of appeals refers in its August 25, 1986, order, is not a finding at all, but a statement the district court made more than a year after the remedial decree was entered, that it had *previously* "found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts [and] large numbers of students leaving the schools of Kansas City and attending private schools." Order of Aug. 25, 1986, J.A. A-126. No citation was given by the district court, and no previous finding actually exists.

vant period of segregation (1968-1973) was that the "numbers involved are too insignificant to have had a segregative impact on the KCMSD or the [suburban districts]." Order of June 5, 1984, J.A. A-757. The Eighth Circuit itself has acknowledged that plaintiffs' "argument based on the actions of KCMSD and white flight run[s] contrary to the factual findings." *Jenkins II*, 807 F.2d 657, 670 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

Moreover, as the district court specifically found, there is "an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to *integrate* its schools." *Jenkins III*, 672 F. Supp. 400, 412 (W.D. Mo. 1985) (emphasis added), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988). The record shows that "white flight" did not occur until the late 1970s, when the desegregation plans were implemented. Pet. App. A-51. The district court also found other causes for the demographic changes within the KCMSD: "[J]obs and economic opportunity were primary motivators for blacks leaving the three county area and moving to Kansas City and elsewhere, and . . . any motivation resulting from segregated schools was *de minimis* and insignificant when compared to those primary motivating factors." Order of June 5, 1984, J.A. A-737. Thus, characterizing "white flight" as an effect of segregation is both counter-intuitive and wholly contrary to the record.

Given the lack of factual support for the assumption that "white flight" is a vestige of *de jure* segregation, the courts' analysis necessarily rests on a far-reaching theory of "but-for" causation—one that would make the State liable for an effect of *desegregation*, rather than for the "incremental" effects of segregation itself, which is the limit of the constitutional violation. And even if such a highly theoretical stream of causation were somehow enough to regard "white flight" as a vestige of the former dual school system, intervening social, economic, and

demographic factors—as well as the passage of time—have made the relationship of current-day "white flight" to the past segregative acts simply "too attenuated to be a vestige of former school segregation." *Board of Educ.* v. *Dowell*, 498 U.S. 237, 250 n.2 (1991). See also *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 211 (1973) ("at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention").

There can be no doubt that the Eighth Circuit's effort to cure "white flight"—a problem arising out of private parties' responses to desegregation, not segregation—seriously enlarges existing notions of remedial duties. As almost every desegregating school district experiences some demographic changes, see *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1447-48 (1992), the Eighth Circuit's approach would mean that the initial remedy would beget the need for additional remedies. Often, as here, this chain of causation would lead a court to impose interdistrict remedies in intradistrict cases or go beyond matters that are within the State's or school district's control. The result would be a continuing cycle of cause and effect, leaving school districts under the perpetual control of the federal courts and requiring remedial plans of potentially indefinite duration and enormous scope. Both consequences are fundamentally at odds with the core holding in *Dowell*.[26]

While the departure of non-minority students will not excuse the failure of a school district to desegregate, it is

---

[26] The KCMSD may be concerned that its own funding resources are inadequate to continue all of the extraordinary educational programs that have been developed in Kansas City. But this is precisely the type of "baggage" that desegregation remedies cannot carry. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971). If the KCMSD is fully unitary, then the State's obligation must terminate, as this Court made clear three years ago in *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992).

equally true that school districts are under no constitutional obligation to undo the effects of such private conduct. Indeed, if the State's deep pocket were not available in this action, no one would seriously argue that the Kansas City School District could be ordered to pay the enormous sums necessary to attract non-minority students from the suburbs—rather than simply to eliminate racially identifiable schools within the district.

4. The lower courts also identified "reduced" system-wide achievement as a vestige of segregation. See, *e.g.*, Pet. App. A-20-21. To cure this "vestige," the courts mandated that the KCMSD take steps to attract non-minority students from surrounding suburban districts, including the improvement of KCMSD student achievement. See *Missouri* v. *Jenkins*, 495 U.S. 33, 76 (1990) ("conclusion that desegregation might be easier if more non-minority students could be attracted into the KCMSD was used as the hook on which to hang numerous policy choices about improving the quality of education in general within the KCMSD") (Kennedy, J., concurring in part and concurring in judgment). In responding to this "vestige," the district court devised a remedy that imposes a requirement of comparability *to suburban school districts*:

> The long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities *equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district.*

Jenkins II, 639 F. Supp. 19, 54 (W.D. Mo. 1985) (emphasis added in part), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). On its face, this standard makes unitary status dependent upon factors outside the district, a course this Court rejected in *Milliken I*. "It cannot be contended that interdistrict comparability, which was the ultimate goal of the district court's orders, is itself a constitutional command." *Missouri* v. *Jenkins*, 495 U.S. at 74 (Kennedy, J., concurring in part and concurring in judgment).

Moreover, such a "suburban comparability" requirement is not based on any showing that current achievement scores are the result of *de jure* segregation of decades ago. It defies logic to believe that past segregation has any effect on the academic achievement of *non*-minority students today. Nor does the record in this case show that even minority students in the KCMSD have lower scholastic skills *as a direct result of de jure segregation that they (and probably even their parents) have never experienced*, especially in light of the many external factors that affect achievement. See *infra* note 32.[27] Where the remedy is properly tailored to the constitutional violation, courts may of course require special remedial programs for the students directly harmed by racial segregation. *Milliken II*, 433 U.S. 267 (1977). But such authority should not be mistaken for a federal judicial license to "provide the KCMSD with facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

Even if "reduced" achievement system-wide were a vestige of Missouri's earlier dual school system, the appellate court's adoption of the educational achievement

---

[27] At most, the testimony cited by the district court in support of its achievement reduction finding establishes only that in many —though not all—KCMSD schools, student performance on standardized tests lagged behind national norms. *See Jenkins II*, 639 F. Supp. 19, 24 (W.D. Mo. 1985); Tr. of Apr. 21, 1985 at 22,130, 22,182 (testimony of Daniel Levine). That testimony also reflects, however, that urban districts with no history of *de jure* segregation also have below-average student achievement, *id.* at 22,228-29, and that some schools in the KCMSD characterized by plaintiffs as "racially isolated" were actually *at* national norms, *id.* at 22,134, because they consisted of students from "predominantly middle class black families." *Id.* at 22,340. The trial court refused to allow the State to question the district's witness on how he could determine that low achievement in the KCMSD was attributable to segregation rather than other factors, on the ground that the court "was not going to get into liability issues." *Id.* at 22,253-54.

standard would nonetheless fall wide of the mark of determining the *State's* responsibility for alleviating vestiges of prior segregation. The KCMSD instructional program is not a program designed, managed, or implemented by the State. Rather, that program is the creation of the plaintiffs, the KCMSD, and the courts below; the State's only role is to provide the funds to finance the program. Thus, the system-wide achievement test does not measure the State's commitment to end segregation, and it certainly does not examine whether any vestiges that could be attributed to the State's pre-1954 actions still remain. To the contrary, it is at most a test of the wisdom of the courts' selection of a controversial educational tool and the KCMSD's success in using that tool. This misguided judicial inquiry should not give rise to any inference that the State has failed to do its part.

5. The across-the-board salary increases ordered by the courts below are equally far removed from the proper exercise of the courts' authority to eliminate "vestiges" of segregation. The error of the lower courts' orders requiring the State to pay extraordinary desegregation monies to fund salary increases for KCMSD cooks, janitors, parking lot attendants, and all other non-instructional personnel is plain from this Court's prior holdings defining the purpose of desegregation remedies. As discussed above, *supra* p. 24, this Court has long held that to require a remedial program, a federal court must find that "the constitutional violation caused the condition for which remedial programs were mandated." *Milliken II*, 433 U.S. at 286 n.17.

The record here is devoid of any finding that existing salary levels in the KCMSD flow from any earlier constitutional violation by the State.[28] The district court's

[28] Nor does common sense suggest such a nexus. As the five judges dissenting from the Eighth Circuit's denial of rehearing *en banc* observed, "logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations." Pet. App. A-58.

stark pronouncement that "[l]ogic and empirical data show that in the absence of [additional] funding for salaries, the District will not be able to implement its desegregation plan," Pet. App. A-86, was the *only* rationale given by that court. The court of appeals affirmed the district court's order granting salary increases to virtually every KCMSD employee. Especially with regard to non-instructional personnel, the lower courts have failed utterly to relate salary funding to the operation of a dual school system, the only constitutional violation in this case.

The possibility of a remedial scheme that exceeds the scope of its desegregation aims obviously is made even greater where courts stray from the course this Court's decisions establish, as this case demonstrates. The courts below failed to tie the court-ordered salary increases to equal educational opportunities in any of the six *Green* areas of school district operations. See, *e.g.*, *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); *Green* v. *County Sch. Bd.*, 391 U.S. 430, 435 (1968).[29] Untethered from the objective guidance provided by the *Green* factors, the court of appeals was able to uphold the salary order on the flawed—but in this litigation, oft-invoked—rationale that it would "improve the KCMSD's desegregative attractiveness." Pet. App. A-26.

The courts' generalized "desegregative attractiveness" standard provides neither the "factual proof" nor "reasoned statement of legal principles" required from a federal court that is "displac[ing] . . . the local authorities." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977). Indeed, such a vague and limitless standard for upholding desegregation programs not only could be used to justify salary increases for employees such as

[29] *Green*, *Swann*, and *Pitts* refer "to the racial composition of teachers and staff," *Swann*, 402 U.S. at 18, not to satisfaction with their salaries. No party has shown or even claimed that higher salaries would enhance racial balance among faculty or staff. This is because there has been no inquiry into this issue at all, even though it is a core factor under *Green*.

cooks, carpenters, and clerical workers—as it has been used here—but also could just as "rationally" justify even more tangential and far-reaching societal relief. For example, such measures as providing jobs to parents, subsidizing housing, sponsoring neighborhood redevelopment, or improving crime prevention might increase the "desegregative attractiveness" of the KCMSD, despite the lack of any causal relationship between these proposals and the operation of a dual school system. But this Court explained in *Swann* that the reach of school desegregation cases cannot be so expanded:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope . . . .

402 U.S. 1, 22 (1971). And as Justice Powell recognized in *Milliken II*, such a broad view of the scope of a desegregation case invites school boards and plaintiffs to use desegregation cases to "extract funds . . . from the State treasury," *Milliken II*, 422 U.S. at 293 (Powell, J., concurring), precisely what has occurred here.

The district court's assumed role as arbiter of KCMSD salaries, historically and logically a matter between a school board and its employees, is also contrary to this Court's emphasis on the paramount importance of local control over the educational process. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken I*, 418 U.S. at 741-42; see also *Freeman*, 112 S. Ct. at 1445; *Dayton*, 433 U.S. at 410. Further, just as " 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory

control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination,' " *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991) (quoting *Spangler* v. *Pasadena Bd. of Educ.*, 611 F.2d 1239, 1246 n.5 (9th Cir. 1979) (Kennedy, J., concurring)), federal judicial control over schools should not extend beyond the *scope* necessary to remedy the discrimination found to exist or to have existed.

II. EVEN IF THE "GOALS" OF THE REMEDIAL PLAN WERE WITHIN THE PROPER SCOPE OF THE AUTHORITY OF THE COURTS BELOW, THOSE COURTS MANDATED IMPERMISSIBLE MEANS FOR ACHIEVING THE STATED GOALS.

A. The Eighth Circuit Erred As A Matter Of Law In Measuring The Success Of The Court-Ordered Programs By Reference To Standardized Test Scores.

Rather than correct the excessive scope and improper goals of the remedy ordered by the district court, the Eighth Circuit has built upon them by demanding increased standardized test scores as a precondition to unitary status. The Eighth Circuit's novel ruling apparently would measure the constitutional sufficiency of the "quality education" component of a comprehensive desegregation remedy by the amount of improved student achievement as measured by students' success on standardized tests. See *supra* p. 17; Pet. App. A-21, A-48, A-61. Such a guaranteed outcome standard is clearly beyond the mandates of the Equal Protection Clause. This outcome-based standard is wholly foreign to traditional equal protection analysis, and creates an untenable standard for determining when a desegregation remedy has achieved its purpose to the extent "practicable." See *Dowell*, 498 U.S. at 250; *Freeman*, 112 S. Ct. at 1446.[20]

---

[20] The district court has been explicit in its dismissal of the "practicability" standard of *Freeman* and *Dowell*. In respect of student achievement, the court found that while "there has been a trend of improvement in academic achievement in the KCMSD,"

1. The "test score" approach finds no support in the Fourteenth Amendment; this Court repeatedly has held that education *per se* is not a fundamental right. See, *e.g.*, *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *San Antonio Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 35 (1973). The Constitution provides no guarantee of an education of any particular quality or of any particular level of individual or collective achievement by students. In *Rodriquez*, this Court distinguished between protection of rights and supposed guarantees of certain levels of those rights:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.

411 U.S. at 36. In other contexts, this Court has likewise never interpreted the Fourteenth Amendment to require equal outcomes. Rather, the Court has long defined an equal protection injury as the denial of equal opportunity resulting from the imposition of an unconstitutional barrier. See, *e.g.*, *Turner* v. *Fouche*, 396 U.S. 346, 362 (1970). The Fourteenth Amendment does not ensure any ultimate ability to obtain the benefit. *Id.* (plaintiffs had the right to be *considered* for appointment without the burden of invidiously discretionary disqualifications, but had no right to be *appointed*).[31]

---

more needs to be done because "the Court is not satisfied that the District has reached anywhere close to its maximum potential." Pet. App. A-131. This novel "maximum potential" standard is wholly unsupported by this Court's holdings, which emphasize "practicability."

[31] The Court recently applied its equal protection injury analysis in *Northeastern Florida Chapter of Associated General Contractors* v. *Jacksonville*, 113 S. Ct. 2297 (1993), in which an association of general contractors challenged an ordinance according preferential

The Fourteenth Amendment requires only improved educational *opportunities*, not a particular level of education, as a prerequisite to either full or partial unitary status. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971), this Court stated:

> If we were to read the holding of the district court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

Id.; see also Pet. App. A-63. The Court's unwillingness in *Swann* to prescribe particular outcomes as a test for racial balancing dooms the Eighth Circuit's outcome-based standard for educational achievement. The elimination of dual school systems, not pre-ordained levels of scholastic achievement (or racial balance), is the hallmark of desegregation remedies. See *Brown I*, 347 U.S. 483, 493 (1954).

2. In addition, the mandate of improved test scores, as measured by national averages, is unreasonably broad and unworkable. The imposition of a *nationwide* standard —far beyond the scope of an intradistrict remedy—sets a goal that may well be unreachable in a practicable sense. Also, as discussed above, there is a lack of specific evidence causally linking system-wide achievement to past segregation. See *supra* p. 41.

---

treatment to minority-owned businesses in awarding city contracts. *Id.* at 2299. The Court determined that because the association's members had been denied the *opportunity* to bid, the association had suffered an injury cognizable under the Equal Protection Clause. *Id.* at 2304. The Court contrasted its 1975 decision in *Warth* v. *Seldin*, 422 U.S. 490 (1975), where the Court held under similar facts that a construction association had *not* suffered an injury cognizable under the Equal Protection Clause. The two cases were readily distinguishable because the association in *Warth*, unlike the association in *Jacksonville*, had made no claim that its members could not apply for permits on the same basis as other firms. Rather, in *Warth* the complaint "was not that they could not compete equally; it was that they did not win." 113 S. Ct. at 2304. That latter claim stated no equal protection injury.

Moreover, as this Court and others have long recognized, numerous factors beyond the provision of educational resources, outside the control of the schools and unrelated to past *de jure* segregation, dramatically affect student achievement. For example, in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982), this Court, in the context of a claim under the Education of the Handicapped Act, 84 Stat. 175, *as amended,* 20 U.S.C. § 1401 *et seq.* (1976 & Supp. IV) noted that "a myriad of factors . . . might affect at particular student's ability to assimilate information presented in the classroom." *Id.* at 198. In the instant case, Circuit Judge Beam, writing for the five dissenters to the denial of rehearing, recognized that the remedial responsibilities should properly be limited to what is within the defendants' control.

> To require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control. Segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement, if they exist in the KCMSD, are not the responsibility of the public school system.

Pet. App. A-64.

The initial decision of the dedicated Eighth Circuit panel simply assumed, without any basis, that the State could succeed in raising test scores, apparently through the continued application of massive resources.[32] The

[32] The panel decision did not discuss non-school-related factors. Nor was any significant evidence presented before the district court, because the requirement of improved student achievement first surfaced in the Eighth Circuit's opinion below. However, in 1985 the trial court acknowledged that "it may be true that poverty results in low achievement regardless of race." *Jenkins I,* 593 F. Supp. 1485, 1492 (W.D. Mo. 1984). Dr. Alspaugh testified at the February 1993 hearing regarding magnet renewal that "children from families with less money tend to show lower reading and math achievement in the KCMSD elementary schools . . . . [S]tudent achievement is highly influenced by the socioeconomic characteristics of the students." Tr. of Apr. 21, 1985, at 2330, 2339.

That conditions other than educational resources determine results on standardized tests has been recognized not only by Dr. Alspaugh, the trial court, and the dissenting judges of the Eighth Circuit, but also in the scholarly literature. *See, e.g.,* D. Armor, *Why is Black Educational Achievement Rising* 66, The Public Interest (Summer 1992) (it is "well-documented that socioeconomic factors are among the major explanations of black-white achievement differences").

court of appeals' requirement that the State and the KCMSD demonstrate a test score increase as a prerequisite to withdrawal of court supervision would thus condemn the KCMSD to federal control for an indefinite period, contrary to the principles set forth in *Freeman* and *Dowell.* See *supra* p. 24.

This Court has never endorsed such a requirement and has routinely limited remedial responsibilities to matters within the control of defendants. As the Court stated in *Freeman,* "Where control lies, so too does responsibility." 112 S. Ct. 1445. The necessary corollary to this rule is that where control does not lie, as in the case of student achievement affected by factors far beyond the school yard, so too responsibility should not be imposed.

B. Across-The-Board Salary Increases For Non-Instructional Employees Will Not Have The Effect Of Drawing Suburban Students To The KCMSD.

As discussed above, the district court made no finding that the current pay scale was itself a vestige of the previous dual school system. Instead, the stated rationale for the court-ordered salary increases is that attracting better "staff" (*i.e.,* janitors, cooks, and clerical workers) to the KCMSD will increase the district's "desegregative attractiveness." Pet. App. A-90. But the court's statement to this effect is nothing more than an unamplified conclusion, lacking any discussion of or citation to record evidence. If the acknowledged superiority of the facilities and programs in the KCMSD schools has not succeeded

in drawing in white students from the suburbs, there is no reason to believe that further increasing the pay of school employees—particularly those who do not have any direct contact with students—will achieve that result. Thus, the court-ordered salary increases are demonstrably improper even when measured against the flawed goals of the courts below.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
MARK D. HOPSON
JANET M. LETSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of the
State of Missouri

JOHN R. MUNICH *
Chief Counsel for Litigation

JAMES R. LAYTON
Appellate Counsel

MICHAEL J. FIELDS
BART A. MATANIC
JANE EILERMANN
NORMAN E. SIEGEL
Assistant Attorneys General

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Counsel for the State of Missouri, *et al.*

November 8, 1994

* Counsel of Record

RESPONDENT'S

BRIEF

No. 93-1823

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT AND AMERICAN FEDERATION OF TEACHERS LOCAL 691

SCOTT A. RAISHER
FREDERIC O. WICKHAM
BRIAN P. WOOD
JOLLEY, WALSH & HAGER, P.C.
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755
DAVID J. STROM
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-7472
Counsel for Respondent American Federation of Teachers Local 691

ALLEN R. SNYDER *
PATRICIA A. BRANNAN
JOHN W. BORKOWSKI
LORI-CHRISTINA WEBB
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741
Counsel for Respondent Kansas City, Missouri School District

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts, in a case of prolonged State-mandated racial segregation with devastating effects on the educational opportunities available to the plaintiff school children, acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where they found that the defendant seeking termination had not shown (1) that the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable; or (2) that release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and where there was no evidence (3) that the defendant seeking such termination had a good faith commitment to its constitutional obligations.

2. Whether the lower courts acted within their discretion to extend orders mandating that the State defendants help to maintain school district salaries at levels repeatedly found necessary to successful implementation of a largely voluntary desegregation plan, where the deplorably low original salaries were in part the result of the State's constitutional violation affecting school district funding.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
A. The Constitutional Harms and the Court-Ordered Desegregation Remedy	2
B. The Proceedings Under Review	9
1. Continuing the *Milliken II* Relief	9
2. Maintaining Salaries To Support Desegregation	15
C. The Present Status of the Remedy	17
SUMMARY OF ARGUMENT	19
I. THE EIGHTH CIRCUIT CAREFULLY APPLIED THIS COURT'S STANDARDS FOR DETERMINING PARTIAL UNITARY STATUS	22
II. WHILE THE STATE SUGGESTS THAT THE LOWER COURTS HAVE ESTABLISHED SOME SPECIFIC LEVEL OF ACHIEVEMENT ON STANDARDIZED TESTS AS A PREREQUISITE TO UNITARY STATUS, THEY HAVE NOT DONE SO, BUT HAVE STATED ONLY THAT EFFECTIVENESS SHOULD BE THE TEST OF WHETHER THE EDUCATIONAL COMPONENTS OF THE REMEDY HAVE MET THEIR GOAL	31
A. In Its Unsuccessful Effort To Secure Rehearing *En Banc*, the State, and Not the Lower Courts, Created a "Standardized Test Scores" Prerequisite to Partial Unitary Status	31

TABLE OF CONTENTS—Continued

Page

B. All Parties Agree That Neither the State nor the School District Should Be Required To Ensure That Students Meet National Norms on Standardized Tests as a Prerequisite to Partial Unitary Status in the Area of Educational Quality 34

III. THE STATE IMPROPERLY INVITES THIS COURT TO AVOID THE ISSUES PRESENTED IN ITS PETITION AND INSTEAD TO DISTURB FINAL FACTUAL FINDINGS AND REVERSE THE SETTLED LAW OF THIS CASE ON ISSUES NOT RAISED BELOW AND NEITHER FAIRLY PRESENTED BY ITS PETITION NOR NECESSARY TO THE RESOLUTION OF THE QUESTIONS THAT ARE PRESENTED 40

A. The State's Attacks on the Findings Concerning Its Liability, the Effects of Its Violation, and the Remedy Necessary To Cure Them Have Been Finally Resolved and Are Not Before the Court 42

B. The Salary Relief Ordered for Non-Instructional Personnel Is Based Firmly on Factual Determinations That Also Have Been Finally Resolved Against the State in Earlier Proceedings 49

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Page

Arizona v. California, 460 U.S. 605 (1983) 42
Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976), *aff'd in part*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978) 45
Austin Indep. Sch. Dist. v. United States, 429 U.S. 990 (1976) 34
Berry v. School Dist. of Benton Harbor, 467 F. Supp. 630 (E.D. Mich. 1978) 45
Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991) ..... *passim*
Bradley v. Milliken, 402 F. Supp. 1096 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) 38
Branti v. Finkel, 445 U.S. 507 (1980) 41
Brown v. Board of Educ., 671 F. Supp. 1290 (D. Kan. 1987), *rev'd*, 892 F.2d 851 (10th Cir. 1989), *vacated*, 112 S. Ct. 1657 (1992), *opinion reinstated*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1994) 36, 38
Brown v. Board of Educ., 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993) 36
Brown v. Board of Educ., 347 U.S. 483 (1954) 27
California v. Taylor, 353 U.S. 553 (1957) 42
Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 41
Cisneros v. Corpus Christi Indep. Sch. Dist., C.A. No. 68-C-95 (S.D. Tex. July 29, 1992) 36
Coalition to Save Our Children v. State Bd. of Educ. of Delaware, 757 F. Supp. 328 (D. Del. 1991) 36, 38
Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) 33
Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) 43, 47
Dowell v. Board of Educ. of Oklahoma City, 778 F. Supp. 1144 (W.D. Okla. 1991), *aff'd*, 8 F.3d 1501 (10th Cir. 1993) 36
Freeman v. Pitts, 112 S. Ct. 1430 (1992) ..... *passim*
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 42
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) .. 41

TABLE OF AUTHORITIES—Continued

	Page
Green v. County Sch. Bd., 391 U.S. 430 (1968)	26
Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 114 S. Ct. 425 (1993)	41
Jacksonville Branch, NAACP v. Duval County Sch. Bd., 883 F.2d 945 (11th Cir. 1989)	38
Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987)	*passim*
Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in part*, 490 U.S. 1034 (1989)	*passim*
Jenkins v. Missouri, 981 F.2d 1009 (8th Cir. 1992)	29
Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988)	33
Keyes v. School Dist. No. 1, 413 U.S. 189 (1973)	33
Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 (11th Cir. 1992)	36
Lee v. Talladega County Bd. of Educ., 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993)	36
Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., No. 1, 659 F. Supp. 363 (E.D. Ark. 1987)	38
Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986)	45
Milliken v. Bradley, 433 U.S. 267 (1977)	5, 27, 33
Missouri v. Jenkins, 490 U.S. 1034 (1989)	1, 9, 44
Missouri v. Jenkins, 495 U.S. 33 (1990)	1, 9
Morgan v. Burke, 926 F.2d 86 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1664 (1992)	36
Namet v. United States, 373 U.S. 179 (1963)	41
NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984)	41
North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971)	36
Northeastern Florida Contractors v. Jacksonville, 113 S. Ct. 2297 (1993)	34
Patrick v. Burget, 486 U.S. 94 (1988)	42
People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905 (N.D. Ill. 1994)	38

TABLE OF AUTHORITIES—Continued

	Page
Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 113 S. Ct. 1489 (1993)	41
Raney v. Board of Educ., 391 U.S. 443 (1968)	33
Reed v. Rhodes, 455 F. Supp. 546 (N.D. Ohio 1978)	38
Richmond v. J.A. Croson, 488 U.S. 469 (1989)	34
San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)	33
Stell v. Board of Pub. Educ. of Savannah, 860 F. Supp. 1563 (S.D. Ga. 1994)	36
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)	33, 36
Tasby v. Dallas Indep. Sch. Dist., No. 3:4211-H (N.D. Tex. July 26, 1994)	36
Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981)	37
Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992)	42
Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310 (1985)	41
United States v. Consumer Life Ins. Co., 430 U.S. 725 (1977)	41
United States v. Fordice, 112 S. Ct. 2727 (1992)	22, 39
United States v. O'Brien, 391 U.S. 367 (1968)	41
United States v. Paradise, 480 U.S. 149 (1987)	36
United States v. Reliable Transfer Co., 421 U.S. 397 (1975)	41
United States v. Wilcox County Bd. of Educ., 454 F.2d 1144 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1972)	37
United States v. Yonkers, 833 F. Supp. 214 (S.D. N.Y. 1993)	38
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)	30
Yee v. City of Escondido, 112 S. Ct. 1522 (1992)	41
Youakim v. Miller, 425 U.S. 231 (1976)	42

OTHER AUTHORITIES

Supreme Court Rule 14.1	41
Supreme Court Rule 24.1	41

COUNTERSTATEMENT OF THE CASE

This controversy does not involve the issues decided by this Court four years ago in *Missouri v. Jenkins*, 495 U.S. 33 (1990), or those on which this Court denied *certiorari* five years ago, *Missouri v. Jenkins*, 490 U.S. 1034 (1989), but involves distinct issues concerning two components of the desegregation remedy for Kansas City, Missouri public school students. First, the lower courts found that the State of Missouri ("State") had failed to offer adequate proof under the clear standards set forth by this Court in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), to establish that educational improvement remedies previously ordered by the district court should be terminated as "partially unitary." The State, however, did not seek review of this relatively mundane, factual issue of the inadequacy of its proof. Instead it sought review of the more arresting, but uncontested, legal question of whether achieving some particular level of test scores is an inflexible prerequisite to unitary status. Brief of Petitioners at 22, 47.[1] Second, the lower courts each twice concluded, affirming earlier factual findings, that maintaining salaries for non-instructional personnel near market levels was necessary to implement the desegregation remedy and that the Kansas City, Missouri School District ("KCMSD" or the "District") could not provide such salaries alone, in part because of the State's constitutional violation affecting District funding. The State's second issue is nothing more than an attack on these settled factual findings.

Now, apparently recognizing the weakness of its arguments on the narrow issues purportedly presented by its Petition and the inadequacy of its proof in the district court, the State uses most of its Brief to make arguments that are far beyond the scope of these two issues. Most of the State's Brief, therefore, has a through-the-looking-glass quality about it, where imagi-

---

[1] The Petitioners' Brief is cited hereinafter as P.B., the Petition as Pet., the Appendix to the Petition as P.A., and the Joint Appendix as J.A.

nation could easily be mistaken for reality and the State's long-since rejected legal arguments and inaccurate factual characterizations confused with live controversies actually addressed below. Indeed, the State raises a slew of factual and legal issues—challenging the district court's initial 1984 findings about liability, the effects of the constitutional violations, and the overall scope of the remedy required to cure them—that were finally resolved against it years ago, that are not addressed at all in any of the decisions under review, and that are not fairly raised by its Petition. No magnet school, capital improvement, or voluntary interdistrict transfer orders, and no orders establishing any new remedial programs, are before the Court.

A. The Constitutional Harms and the Court-Ordered Desegregation Remedy

The principal question decided below, whether the State has established that the KCMSD is partially unitary, arises from the State's opposition to a motion filed by the plaintiffs and the District seeking to continue for the 1992-93 school year certain educational improvements. The remedy originally was ordered because in September 1984, after a 92-day trial, the district court (the Honorable Russell G. Clark) found both the State and the District liable for unconstitutionally segregating the schools of KCMSD for a century and for failing for three decades in their affirmative duty to undo the harm of that segregation. J.A. 14, 46-50. The State did not appeal the determination of liability.

1. *The Effects of the Constitutional Violations.* In his initial liability order with respect to the KCMSD and the State, entered on September 17, 1984, Judge Clark explicitly found that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District," J.A. 23, and that State-mandated segregation has resulted in the continued racial isolation of minority students. J.A. 24. In a series of subsequent orders, following the submission of additional evidence, Judge Clark found more specifically

that the constitutional violations had caused a variety of related injuries to KCMSD students. He explicitly found "a system wide *reduction* in student achievement in the schools of the KCMSD," J.A. 58 (emphasis in original); "low achievement" and a "general attitude of inferiority among blacks," J.A. 23; racial isolation in the schools, J.A. 24, 126; and severe deterioration in the physical conditions of the schools. J.A. 89, 133, 219-20, 237. The State is incorrect when it claims "[t]he *sole* vestige that the district court identified" in the liability order was the maintenance of segregated schools, P.B. 5-6 (emphasis in original), and that Judge Clark later identified certain "racially 'isolated' schools as the only vestige of *de jure* segregation within the KCMSD." P.B. 8. Judge Clark made no such statements.

Judge Clark did find that pervasive segregation remained in district schools. By 1984, 30 years after *Brown I* and seven years after the District first implemented on its own a largely ineffective busing plan, there were still "24 schools . . . racially isolated with 90+% black enrollment" and the dual school system had not yet been dismantled. J.A. 25. Judge Clark also expressly found that the segregated system and various acts of defendants had caused the departure of large numbers of white students to suburban and private schools. J.A. 126. The State did not challenge the finding that its constitutional violation and its failure to remedy it had caused segregation in student enrollment.

The district court also recognized severe deficits in the education and basic skills of KCMSD students caused by segregation. J.A. 23, 58. Judge Clark specifically found that "[the] education process has been further 'bogged down' in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers." *Id.* Segregation, Judge Clark confirmed, had "ruin[ed] attitudes" of black students in KCMSD. J.A. 23. Moreover, the court found that the situation was "correctable." J.A. 58. On appeal,

the State challenged Judge Clark's findings concerning the systemwide nature of these effects and the Eighth Circuit sitting *en banc* implicitly rejected this argument. *Jenkins v. Missouri*, 807 F.2d 657, 685 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987).

Judge Clark further found that the school buildings in the KCMSD had "literally rotted," J.A. 237, and that the lack of revenue that had caused this deterioration flowed directly from the State's unconstitutional conduct. J.A. 220. *See also* J.A. 133. Segregation led to the identification of particular KCMSD schools as "black," then to the identification of the KCMSD itself as a black district, then to severe underfunding and the deterioration of the entire system, and ultimately to an inferior education for all students who remained. In affirming the district court's findings, the Eighth Circuit explained that in this manner the State fostered increased segregation long after *Brown:* "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." *Jenkins v. Missouri*, 855 F.2d 1295, 1305 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989).

2. *The Origin of the Remedial Components at Issue Here.* Judge Clark rejected mandatory busing as a remedy for these conditions. He explicitly found that "[t]he evidence is clear, further mandatory reassignment at this time will only serve to increase the instability of the KCMSD and reduce the potential for desegregation." J.A. 86. He ordered instead a desegregation plan based on educational improvements, magnet schools, capital improvements, and voluntary interdistrict transfers. J.A. 54-101. These programs all have the dual purposes of remedying the educational harms within the District and desegregating its schools through three complementary means: (1) to improve the education available to the

plaintiff school children; (2) to bring about, through individual family choices, a voluntary redistribution of children within the KCMSD; and (3) to reverse the State-initiated pattern of decreasing non-minority enrollment by maintaining white students and attracting back voluntarily those who had been driven to attend private and suburban schools as a result of the constitutional violations and the defendants' failure to remedy them. P.A. 18; *Jenkins*, 855 F.2d at 1302.

The cornerstone of this desegregation remedy consists of the basic educational improvements, known among the parties as the *Milliken II* programs because they generally are relief of the type that the Court first expressly approved in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). These programs were designed to directly redress the educational harms suffered by the plaintiff school children and to provide a foundation for other efforts to desegregate the District. *See, e.g.*, J.A. 64, 67, 71, 72 and 73.

Judge Clark did not fashion these basic educational remedies out of whole cloth but rather took guidance in their development from local authorities, reviewing desegregation plans submitted by the KCMSD and the State. While the State now accuses the district court in 1985 of using *post hoc* findings to "rationalize" an "expansion of remedial authority" to include educational improvements, P.B. 8, the State itself suggested such remedial measures at the time. Judge Clark agreed with the State's suggestion that it was "appropriate to include a number of properly targeted educational programs in a desegregation plan." J.A. 58 (quoting State Plan at 5). The State had noted the importance of "making sure schools give every student the opportunity for a good, fundamental education." State Plan at 2-3. The State specifically endorsed programs that would allow the KCMSD to achieve the AAA status (as defined by the State Board of Education) held by all of the other school districts

in the metropolitan area, J.A. 61; additional teachers, J.A. 63; an early childhood education program, J.A. 74; a summer school program, J.A. 70; full-day kindergarten, J.A. 72; and an extended school day in selected schools. J.A. 73. The State did not appeal "substantial portion[s]" of this initial remedial order, including most of these educational improvements. *Jenkins*, 807 F.2d at 682.[2]

Nor did the State challenge on appeal the district court's initial remedial orders approving salary relief in this case. These orders stem from Judge Clark's requirement that "the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program." J.A. 234 (citations omitted). He further observed that the competitive position of the KCMSD regarding salaries "ha[d] deteriorated significantly" and that "[c]onsequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted." J.A. 234-35. The court approved the expenditure of $7.147 million of locally raised desegregation funds for each fiscal year until 1991-92 "to fund teacher salary increases." *Id.* The State appealed this order, and challenged other issues but did not raise the salary increases for the 1987-88 through 1991-92 school years, and the Eighth Circuit left that portion of the order undisturbed. *Jenkins*, 855 F.2d 1295. The State sought *certiorari* on a number of issues involved in that decision but again

[2] The State raised issues concerning only the two *Milliken II* programs for which the district court had ordered it to pay 100 percent, challenging the cost allocation and claiming that both programs were inappropriate because they operated districtwide and not only in racially isolated schools. The Eighth Circuit sitting *en banc* rejected the State's claim that the relief was beyond the scope of the violation, but agreed that the costs should be shared by the KCMSD. *Jenkins*, 807 F.2d at 684-85. The State did not seek a writ of *certiorari* to challenge that decision.

did not challenge the salary relief. In 1990, following a court-ordered study of how KCMSD salary rates affect the desegregation plan, a settlement was reached among all of the parties, authorizing the KCMSD to use desegregation funds, contributed by KCMSD and the State, to maintain minimally adequate salaries over the next two-year period.

3. *The State's Appeals Concerning Other Remedial Issues.* While for years the State did not challenge on appeal most of the *Milliken II* programs and the salary relief, it appealed virtually every other aspect of the district court's early remedial orders. The State challenged the provision in the court's initial remedy order directing the State to establish and fund a voluntary interdistrict transfer plan under which KCMSD minority students could choose to transfer to any predominantly white suburban school districts that elected to participate. The State argued on appeal that requiring it to develop such a plan was an improper "interdistrict remedy for an intradistrict violation" under *Milliken I*. *Jenkins*, 807 F.2d at 683. The *en banc* Eighth Circuit affirmed, expressly rejecting the State's argument. *Id.* The State did not seek review in this Court of the Eighth Circuit's decision.

The State also challenged subsequent orders establishing magnet schools and requiring that dilapidated schools be renovated or replaced. The State challenged both the establishment of magnet schools and the renovation and reconstruction of schools, arguing that "the goal of attracting non-minority students from private schools and suburban schools is not warranted by the nature of the constitutional violation unless KCMSD and the State . . . caus[ed] students to withdraw from the system." *Jenkins*, 855 F.2d at 1302. The Eighth Circuit again held as a matter of law that "*voluntary* interdistrict remedies" could be used to desegregate predominantly minority districts, *id.* at 1302, and that the factual pre-condition for voluntary interdistrict relief under the State's standard was

satisfied in this case because the district court had correctly found that "the State and KCMSD's constitutional violations . . . caused white flight." *Id.* The State argued to the Eighth Circuit that Judge Clark's June 5, 1984 ruling dismissing the suburban school districts as defendants contradicted this finding, and the Eighth Circuit expressly rejected this contention. *Jenkins,* 855 F.2d at 1303. The State also argued again that the district court had erred in ordering the magnet school plan because it would improve education throughout the District. The court again rejected the State's argument that the remedy was impermissibly systemwide in scope. *Id.* at 1304.

The Eighth Circuit relied on the same reasoning in affirming the capital improvements required by the district court. The Eighth Circuit noted the district court's findings that unconstitutional segregation and the resulting denial of funding were "in part responsible for the decay of KCMSD's buildings" and that "capital improvements were necessary to restore the victims" of segregation where they would have been but for these constitutional violations. *Id.* at 1304-05; *see also Jenkins,* 807 F.2d at 685.

The State also appealed Judge Clark's determinations that it was necessary for the KCMSD to increase its tax levy to help pay for the desegregation plan. He had found that KCMSD did not have sufficient revenue to fund its full share without undermining the quality of its basic educational program and, as a result, the voluntary desegregation remedy itself, J.A. 234, and that the District's inability to raise sufficient funds was itself partially a product of the State's acts of illegal discrimination. *See supra,* page 4. Judge Clark had concluded that he had no choice but to order extraordinary funding relief, including increasing the District's property tax levy. On appeal, the Eighth Circuit modified the district court's order so as to enjoin certain State laws prohibiting the KCMSD from raising its property tax. *Jenkins,* 855 F.2d at 1314.

In 1988, the State sought a writ of *certiorari* from this Court to address the magnet school plan, the capital improvements plan, and the injunction against state laws preventing KCMSD from raising sufficient local revenues to pay toward its share of remedial costs. This Court denied *certiorari* on the questions involving the scope of the remedial orders but granted a writ to review the tax question. *Missouri v. Jenkins,* 490 U.S. 1034 (1989). The Court held that the district court had exceeded its authority in increasing the KCMSD's tax levy directly, but that the courts could enjoin State laws so as to allow the District to levy taxes in excess of limits set by State law in order to fund the desegregation remedy. *Missouri v. Jenkins,* 495 U.S. 33 (1990).

Overall, since the first remedial order in 1985 the State has appealed to the Eighth Circuit 16 times and sought *certiorari* six times. In the district court, the State also has consistently opposed and continues to oppose virtually every aspect of the remedy. P.A. 123. In 1991, the State accused the District of "repetitious failures" in implementation and in early 1992 asked the district court to place the KCMSD in receivership. J.A. 389. The following year, the State denied the KCMSD full accreditation. J.A. 563-65. Judge Clark specifically found in 1993 that "the State *never* offered a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD." P.A. 123 (emphasis in original).

B. The Proceedings Under Review

1. *Continuing the Milliken II Relief.* In the spring of 1992, the plaintiffs and the KCMSD moved the district court to order the continuation of the basic educational improvement programs for one year. The State, on the heels of this Court's decision in *Freeman v. Pitts,* 112 S. Ct. 1430 (1992), argued in its brief in response to this motion that these programs should be terminated because each individually was partially unitary. The State, however, did not file a motion seeking such relief. The

State stipulated, for most of the principal *Milliken II* components, that if the district court concluded that KCMSD was not partially unitary, "the parties agree to the budget and the scope of the program as proposed." J.A. 376, 402. Only with respect to two components did the State claim that the remedial proposal was not narrowly tailored to the scope of the violation. P.A. 72-73. With respect to other existing *Milliken II* programs, the State also reserved its factual arguments, including whether some of the programs were so ineffective that they should be terminated. J.A. 377-78.

Before ruling on the disputed portions of the one-year extension motion, Judge Clark conducted an evidentiary hearing. The District's evidence addressed the need for the pr[illegible]grams for which there was no stipulation with the Stat[illegible] In response to the State's claim that these programs w[illegible] ineffective, the District presented evidence that the r[illegible]ial isolation caused by segregation was decreasing and [illegible]tudent achievement was improving in the KCMSD. *See, e.g.*, J.A. 410-11, 417-22. Anticipating a possible attempt by the State to demonstrate partial unitary status (despite the fact that the State had filed no motion seeking such relief), the District also offered testimony that additional progress in remedying the vestiges of segregation previously identified by the district court was practicably attainable. *See, e.g.*, J.A. 422, 425. KCMSD's witnesses also confirmed that in practice the *Milliken II* programs remained integrally related to each other and to the rest of the remedy. J.A. 423-25.

In contrast, the State's single *Freeman* witness, Dr. Terry Stewart of the Missouri Department of Elementary and Secondary Education, testified only that (1) both defendants had complied with previous court orders concerning each program; (2) the level of certain educational resources provided by some of the programs was higher in the KCMSD than in some surrounding school districts; and (3) therefore, the quality of educational

opportunities in the KCMSD presumably must have "improved." The State's entire affirmative case on its *Freeman* argument is contained in 44 pages of the Joint Appendix. J.A. 439-83.

Dr. Stewart conceded that he had said *nothing* about whether the educational improvement components of the remedy had eliminated to the extent practicable the vestiges of segregation in the areas of student enrollment or educational quality. J.A. 483. The State never mentioned the racial composition of any KCMSD school. On the interdependence of the remedial programs, the State offered only conclusory testimony that those programs are "distinct and separate," J.A. 479, and argued that the orders developing the details of the various remedial components were entered at different times. It offered no evidence at all about its good faith commitment to the goals of the court-ordered remedy. Finally, the State also attempted to prove that some of the same programs that it claimed were partially unitary were also ineffective. *See, e.g.*, P.A. 70; J.A. 391. The State based its opposition to one program specifically on the State's factual contention that the program had resulted in inadequate student progress as measured by standardized test scores, rejecting the KCMSD's contention that a broader array of indicators should be examined. P.A. 70; J.A. 415-16.

After hearing the State's limited and contradictory evidence, Judge Clark did not act "without comment," P.B. 15, but stated clearly from the bench why he was rejecting the State's *Freeman* argument. While the State claims that "improvement in standardized test scores was the *only factor* lacking" with respect to unitary status, P.B. 17 (emphasis in original), Judge Clark did not mention test scores at all but explained that until the State came forward with evidence that the KCMSD's schools were desegregated to the extent practicable its argument that core elements of the desegregation plan should be terminated was unfounded:

> The Court's goal was to integrate the Kansas City, Missouri, School District to the maximum degree possible, and all these other matters were elements to be used to try to integrate the . . . schools. . . . [W]hen Dr. Stewart says no particular goal has been set, I think he's in error. The goal is to integrate the [KCMSD]. . . . If the [District] had not been segregated, the case woud not have been here in the first place. It's no constitutional violation to not provide quality free education. [J.A. 482.]

The court also rejected most of the State's factual contentions concerning the alleged ineffectiveness of particular programs, and ordered the continuation of most of them. P.A. 70-72. Judge Clark, however, agreed with the State that a proposed program to serve middle school students was not properly tailored because it proposed "use of desegregation funds to help remedy a nationwide problem which the KCMSD has not specifically shown to be a vestige of segregation." P.A. 73.

The State appealed Judge Clark's 1992 rejection of its *Freeman* argument, but the Eighth Circuit affirmed. The court of appeals held that the State had not met its burden of establishing partial unitary status under *Freeman*, concluding that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." P.A. 19. The Eighth Circuit identified two other independent reasons the State was not entitled to be released from its obligations. The State had failed even to address the other criteria set forth by this Court in *Freeman*: "whether retention of judicial control [over the educational improvement programs] was necessary or practicable to achieve compliance with the decree in other facets of the school system," and whether "[t]he State . . . has demonstrated a good faith commitment to the whole of the court's decree." *Id.*

The Eighth Circuit cited findings that Judge Clark made in two orders after his 1992 *Milliken II* order. P.A. 12-13. While the proceedings in neither of these matters are before this Court and were not before the

Eighth Circuit at the time, the court of appeals viewed them as illuminating Judge Clark's rejection of the State's partial unitary status arguments in 1992. The first such order was Judge Clark's ruling in April 1993 after a three-week hearing concerning the proposed continuation of the magnet school component of the remedy. The State did not argue that this component of the remedy was unitary but that it was ineffective. Judge Clark ruled that the magnet plan had made progress in desegregation in student assignments but also concluded that more progress was necessary and practicably attainable. P.A. 131. Likewise, he specifically found that while "there had been a trend of improvement in academic achievement in the KCMSD," the District has not made sufficient progress. *Id.* The court ordered the continuation of the magnet plan for two years, but denied the District's proposed modifications. No party appealed any aspect of this decision.

The second order concerned the plaintiffs and KCMSD's request for the continuation of the *Milliken II* programs for 1993-94 and 1994-95, which Judge Clark decided while the 1992 *Milliken II* appeal was pending. The State again argued in its response, without filing a motion, that these programs were "unitary" and that the State's funding obligation should end. At a one-day hearing, the State presented no live witnesses at all to support its *Freeman* argument; its only affirmative evidence on that issue was a brief affidavit from the same witness who had testified in support of partial unitariness at the 1992-93 hearing, reiterating the substance of his 1992 testimony. The State's affidavit was silent on the State's good faith, the inter-relatedness of the various remedial programs, and whether the remedy had succeeded in eliminating the vestiges of segregation to the extent practicable in KCMSD. In his July 30, 1993 Order,[3] Judge

[3] The State repeatedly refers to the district court's statement in this order that the KCMSD has "facilities and opportunities not available anywhere else in the country," *see e.g.* P.B. 12, 15, 37.

Clark again rejected the State's argument, because "[t]he *Milliken II* component is an integral part of the overall desegregation remedy;" "the State's arguments that these components have attained unitary status are unpersuasive;" "[t]he State should not be heard to complain that the desegregation plan is a complete failure on the one hand [referencing its opposition to the magnet plan] and that the *Milliken II* components are completely successful on the other; and while "the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy, . . . they have not yet met these goals in their entirety." P.A. 112-13. The Court found that it would be "wholly inappropriate to deem the KCMSD unitary or partially unitary. . . ." P.A. 113.[4]

The State failed in an attempt to secure rehearing or rehearing *en banc* from the Eighth Circuit's affirmance of the continuation of *Milliken II* relief at issue here. It did manage to create a controversy among the judges of the Eighth Circuit, however, persuading some that the panel had quietly elevated improvement in standardized test scores to make it an essential prerequisite to partial unitary status, P.A. 59, and provoking an explicit denial from the majority. P.A. 48 ("[n]othing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration they are unitary"). Even the dissenters from the denial of rehearing *en banc*, however, questioned whether the State had made an adequate record

quoting P.A. 115. This statement is in the midst of a passage aimed at encouraging the non-party Kansas City government to do more to provide security for KCMSD's *buildings and equipment*. There was no evidence submitted to the court comparing these physical facilities to those in any other school district.

[4] The Eighth Circuit affirmed that determination. J.A. 578. The State's petition for *certiorari* from that decision is pending. *Missouri v. Jenkins*, No. 94-434 (filed Aug. 31, 1994).

to support its *Freeman* argument. P.A. 58. Rather than file a motion and supplement its record, the State filed its Petition seeking a writ of *certiorari* from this Court.

2. *Maintaining Salaries To Support Desegregation.* The second question the State raises in its Petition concerns the extension of orders repeatedly affirmed by the Eighth Circuit that require KCMSD's salaries to be maintained at levels that permit the hiring of capable personnel to implement the desegregation plan. In early 1992, the KCMSD, the American Federation of Teachers Local 691 ("AFT"), an intervenor in this case, and the plaintiff school children all sought continued desegregation salary relief. P.A. 76. Despite the fact that it had never challenged the 1987 salary relief and had agreed to such relief in 1990, the State proposed that salaries be rolled back to their 1986 levels. P.A. 83. The State's approach would have caused starting salaries for teachers to fall from "$22,215 to just over $17,000." P.A. 79. For a more experienced teacher or one with an advanced degree, the pay cut would have been even more dramatic. J.A. 485, 89-91, 494-97, 500-01. In contrast, the KCMSD proposed simply to maintain salaries at then-current levels. J.A. 492-93, 498-99.

After a four-day hearing, Judge Clark expressly reaffirmed his earlier unchallenged fact finding that support for District salaries is essential for desegregation. P.A. 88. "Logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan," P.A. 86, because salaries between 29 and 41 percent below market rates would make it impossible for the District to recruit or retain capable employees. J.A. 486, 497. Judge Clark did not limit his findings to the need for quality teachers and other instructional personnel: "In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain quality teachers, administrators and *staff*." P.A. 90 (emphasis added). Judge Clark concluded his order by stating in the strongest terms why he was rejecting the State's drastic alternative:

> The State's proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court's plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan. [P.A. 91.]

When the KCMSD and the AFT each made different proposals in 1993 to maintain salaries at levels close to market levels for 1993-94, the State again proposed to roll salaries back thousands of dollars to pre-1987 levels. J.A. 514-15, 518-19, 524. After a three-day hearing in June of 1993, Judge Clark again expressly found that the "evidence presented at trial reaffirmed the position that the support personnel of the district are critical to the successful implementation of the desegregation program." P.A. 104. On the basis of these findings, he ordered continuing salary relief, which left District salaries "roughly competitive" with, but still as much as 7-28 percent below salaries paid by competing school districts to teachers with comparable levels of experience and education. P.A. 102; J.A. 512-13, 516-17, 520-21. Absent such relief, salaries would be as much as 41 percent below those in comparable districts. J.A. 497. The State appealed both decisions but did not challenge as clearly erroneous the district court's findings of fact concerning the necessity of this relief to effective implementation of the remedy. P.A. 23.

The court of appeals affirmed both of the district court's orders approving salary relief as part of the desegregation plan, on two grounds. First, the court affirmed the district court's unchallenged fact finding, based on the extensive evidence before it, that desegregation funding to maintain KCMSD salaries was "essential to comply with the court's desegregation order." P.A. 34. Just as

adequate facilities are critical to improving education and accomplishing desegregation through voluntary student assignment choice, so too are adequate teachers and staff. In addition, the Eighth Circuit reiterated its prior conclusion that the State's failure to remove the vestiges of the dual school system in KCMSD had contributed to the District's inability to raise sufficient funds to operate the school system, including paying adequate salaries. P.A. 26, 30-31. The State unsuccessfully sought rehearing or rehearing *en banc* of the salary issue. Again, not only was review denied, but even the dissenters from the denial of *en banc* review indicated that they would not rehear the district court's orders concerning salaries for "teaching and direct educational support personnel." P.A. 57.

C. The Present Status of the Remedy

Despite the State's obstruction and the massive injuries caused by the segregation of Kansas City's public schools, the KCMSD has made remarkable progress toward addressing the vestiges of segregation. The racial composition of the District's student enrollment has remained roughly constant over the last 10 years after decades of dramatic declines in the percentage of white students. J.A. 410-11. Voluntary student assignment choices have resulted in a 50 percent reduction since 1984-85 in the number of KCMSD elementary schools that remain more than 90 percent black. J.A. 417-19, 433-35. At a January 1993 hearing, one of the State's principal witnesses had to admit that the remedy had reduced segregation in "all fifteen [magnet] elementary schools that had suffered the most intense racial isolation," made progress in integrating secondary schools (some of which had "achieved high levels of integration"), and "substantially improved" on an index of desegregation in the schools. P.A. 129. The abysmal pre-1985 levels of student achievement in the KCMSD have also risen as a result of the District's remedial efforts, although all the educational vestiges of the constitutional violation have not been eliminated to the extent practicable. J.A. 419-21, 436-38.

While the cost of the effort to date to cure the violations has been considerable, the *Milliken II* and salary remedial orders at issue here involve nowhere near the $1.3 billion implied by the State, which covers the last 10 years' costs of all remedies, a substantial portion of which actually has been paid by the KCMSD. Rather, the *Milliken II* relief at issue here involved expenditures of approximately $54 million, or $1,478 per student in 1992-93, the only year for which the educational improvements were ordered in the decisions under review.[5] Only about 75 percent of this was paid by the State. In addition, substantially less than 20 percent of the salary relief goes to the salaries of non-instructional employees challenged here. J.A. 502 ("other employees," which includes hundreds of classroom paraprofessionals and school principals directly responsible for the education of children, as well as the support personnel attacked by the State, constitute about $10 million of the annual budget).

Finally, while the State discusses a number of totally unrelated developments in the district court, it ignores

[5] The overall per-pupil expenditure figures in the State's Brief, P.B. 17 n.15, are inflated as well. The State itself supplied these numbers directly to the Eighth Circuit and the dissenters from the denial of rehearing *en banc* simply adopted them, ignoring the District's earlier critique of the State's approach. *See* Letter from Patricia Brannan to Michael Gans (July 16, 1991); *see also* KCMSD Financial Plan Filed in Response to April 16, 1993 Order (filed July 30, 1993). The District had pointed out, for example, that the State's numbers included all expenditures but in calculating per-pupil costs did not count students in some court-ordered programs and generally were based on incorrect average daily attendance figures rather than actual enrollment. *Id.* 2-4. Correcting for these errors, the District's actual total current expenditures in 1991-92 were $7,665.18 per student, excluding capital expenditures, and $10,807.24 including capital expenditures. *See* 1991-92 Final KCMSD Annual Secretary of the Board Report (October 13, 1993) (expenditures) and KCMSD Financial Plan at Attachment A (enrollment). This latter figure remains misleading, however, because 1991-92 capital costs included a particularly large portion of the court-ordered renovation and reconstruction, most of which is now complete, and which will serve the District's students for decades.

significant recent developments. First, Judge Clark last year *sua sponte* ordered the parties to submit transition plans based on the assumption that the remedy will be phased out over a period of three, five, seven or 10 years. P.A. 141. Second, while the State incorrectly suggests that the 1992-93 cost of the *Milliken II* program was typical, P.B. 10, it neglects to mention that the costs have actually declined in each of the last two years.[6] Third, while the State has never filed a motion for partial unitary status in this case, it has recently announced its intention to do so in advance of a hearing anticipated for 1995 to consider the status of the remedy. State's Second Status Report Regarding Long Range Magnet Renewal and Capital Issues (filed November 10, 1994).

SUMMARY OF ARGUMENT

Before 1954, the State of Missouri aggressively mandated the segregation of Kansas City's public schools. From 1954 to 1984, the State did nothing to remedy the effects of its violation, and this failure, in conjunction with the District's, perpetuated the dual school system and exacerbated its effects in derogation of the clear mandates from this Court. After 1985, the State reflexively opposed virtually every effort to remedy the severe effects of these violations, unnecessarily prolonging the remedial process.

Despite the State's constant opposition, the KCMSD is making progress. The remedy ordered by the district court is working. Racial isolation is declining. The District provides better educational opportunities for the plaintiff school children and is eliminating much of the educational harm they suffered due to segregation. Yet more remains to be done in both areas to cure as fully

[6] For example, the annual budget for the Effective Schools program, which the State singles out for criticism, P.B. 9, was reduced by 50 percent this year by stipulation among the parties, from more than $7.3 million to $3.6 million. Order of July 17, 1994.

as practicable the severe effects of the constitutional violations found in 1984.

In 1992, the plaintiffs and the KCMSD filed a motion to continue for one year the basic educational improvements first ordered by the court in 1985. While the motion was pending, this Court decided *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), and within a few weeks the State had seized upon it as the latest weapon in its public crusade against the desegregation remedy in Kansas City. The State hastily filed a response claiming each of the foundational educational improvements ordered by the district court was now partially unitary and should be terminated. While stipulating to the budgets and the scope of most of the programs, the State reversed its long-standing tactic of criticizing the District's implementation of the remedy and argued instead that these particular programs had been fully implemented, had provided the books, teachers, librarians, and counselors as intended, and, therefore, should be terminated under *Freeman*.

When the district court held a hearing concerning which of the programs should be continued, however, the State offered *no evidence* that the vestiges of segregation in the District, including severe racial isolation and a systemwide reduction in academic achievement, had been remedied to the extent practicable. It offered *no evidence* about what factors other than segregation might have caused the over-90-percent black schools that remain or the continued educational deficits. It offered *no evidence* about how the voluntary remedy could continue to make progress in desegregating student enrollment if the basic quality of education were plunged back to 1984 levels. Finally, it offered *no evidence* that it had a good faith commitment toward desegregation in Kansas City. The trial court and court of appeals thus properly rejected the State's partial unitary status argument on the ground that it had failed to meet its burden of proof under *Freeman*.

Rather than offer any additional proof in the district court, however, the State simply changed its legal argument in the court of appeals. In unsuccessfully seeking rehearing *en banc*, the State latched onto dicta in the panel opinion indicating unremarkably that one should look to educational programs' effects on students in assessing whether the programs may be terminated as "partially unitary." The State repackaged this dicta as a statement all the parties agree is incorrect, the only dispute being whether the Eighth Circuit said it: A school district's progress toward unitary status in the area of educational quality must be measured by national norms on standardized tests, or some other numerical requirement. This Court granted *certiorari* to review this question and an unrelated, fact-bound question about the need to maintain certain district salaries at a level repeatedly found necessary to implement the desegregation remedy without diminishing the District's basic educational program.

Perhaps recognizing that when this Court examined its principal question presented, this Court would find no legal error—and no one defending the position it attacked—the State now claims that the educational improvements and salary relief continued here were impermissible to begin with, based on all the factual and legal arguments it has repeatedly litigated and lost over the past decade, none of which it raised in the proceedings below, or in its Petition. The State now devotes 90 percent of its Brief to these unpresented and long-resolved issues.

This Court should review, at most, the questions actually presented by the judgment below, examine the record, and conclude, as the Eighth Circuit did that (1) the State failed to meet the burden required by *Freeman* to prove partial unitary status; and (2) the district court's factual findings about the need for salary relief in order to implement the desegregation remedies are not clearly erroneous.

ARGUMENT

I. THE EIGHTH CIRCUIT CAREFULLY APPLIED THIS COURT'S STANDARDS FOR DETERMINING PARTIAL UNITARY STATUS

This Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where (1) "the vestiges of past discrimination [in that area] had been eliminated to the extent practicable," 112 S. Ct. at 1446 (quoting *Board of Educ. of Oklahoma City v. Dowell,* 498 U.S. 237, 249-50 (1991)); (2) "there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," *id.*; (3) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the system," *id.*; and (4) the defendant "has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Id.* The Eighth Circuit's decision recognizes each of these standards and correctly holds that the State failed to carry its burden of proof on three of these four issues. P.A. 19.

This Court left no doubt that partial relinquishment of judicial control in a school desegregation case is only appropriate "where justified by the facts of the case," *Freeman,* 112 S. Ct. at 1445, and that the burden of demonstrating unitary status rests with the defendant. *Id.* at 1447. The State's legal analysis of vestiges, P.B. 33-35, therefore, misses the point. There is no question that a "vestige of discrimination must be an identifiable condition or practice fairly traceable to . . . the . . . constitutional violation." P.B. 33. Once such a vestige is proven by the plaintiff and found by a court, however, the burden shifts to the defendant to establish that it has been cured. *Freeman,* 112 S. Ct. at 1447. *See also United States v. Fordice,* 112 S. Ct. 2727, 2743 (1992) (O'Connor, J., concurring) (it is the defendant's "burden to prove that it has undone its prior segregation"). Here, the State failed in the district court to move for a declaration of unitary status or to carry its burden of proof on this Court's standards for the partial relinquishment of judicial control. Instead, the State argued that the "establishment of the programs by compliance with the court order is all that is required." P.A. 19.

1. *Vestiges of Segregation.* In ignoring the racial composition of KCMSD's schools and focusing exclusively on the educational resources provided, the State misses one of the fundamental tenets of school desegregation law reaffirmed by this Court in both *Freeman* and *Dowell.* Defendants in school desegregation cases have an affirmative duty to remedy the constitutional violations that they have caused:

> The District Court should address itself to whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, *and whether the vestiges of past discrimination ha*[*ve*] *been eliminated to the extent practicable.* [*Freeman,* 112 S. Ct. at 1446 (quoting *Dowell,* 498 U.S. at 249-50 (emphasis added)).]

The State simply failed to provide the district court with the facts necessary to determine whether it has accomplished this task. Because the State had the burden of proof on this issue and failed even to attempt to meet it, the judgment should be affirmed. Indeed, even the dissenters from the denial of rehearing *en banc* noted that whether the *Freeman* standards have been met may "still [be] an open question on the record before us today." P.A. 58.

The State did not even allege, let alone attempt to prove, that the educational harms and racial isolation caused by State-mandated segregation in the KCMSD had been eliminated to the extent practicable, although the basic educational improvements ordered in this case are designed to address the legacy of segregation in both of these areas. *See, e.g.,* J.A. 64, 67, 71, 72, 73 (educa-

tional programs ordered in part to remedy educational harm and to help in "attracting and maintaining non-minority student enrollment"). The State's evidence did not mention the level of racial isolation in the KCMSD, the "system wide *reduction* in student achievement," the "low achievement" among minority students, or the "general attitude of inferiority among blacks"—the very vestiges of segregation those programs are designed to remedy. *See supra*, pages 2-3. Indeed, despite claiming partial unitary status under *Freeman*, the State objected to the *relevance* of the evidence presented by the District concerning the levels of racial isolation and academic achievement in KCMSD. *See, e.g.*, J.A. 421.

It is ironic that the State claims before this Court that "the courts below have lost sight of the goal of eliminating one-race schools," P.B. 19, when in fact this goal was paramount in the district court's consideration of the State's partial unitary status defense, and the State itself failed to present a scintilla of evidence suggesting that by any measure KCMSD's student enrollment was desegregated to the extent practicable. When Judge Clark rejected the State's partial unitary status argument, he explained that the State's one *Freeman* witness was simply incorrect in assuming that the relevant goal in this case was providing resources comparable to surrounding school districts because "[t]he goal is to integrate the [KCMSD]." J.A. 482. "[A] critical beginning point [in assessing unitary status] is the degree of racial imbalance in the school district . . . ." *Freeman*, 112 S. Ct. at 1437. The State's proof never mentioned this "critical beginning point." *Id.* The evidence submitted by the KCMSD, while showing that significant desegregative progress had been made, also revealed that almost 20 percent of the District's 70 schools remained severely racially isolated, with student enrollments 90 percent or more black. *See, e.g.*, J.A. 433.

The State now argues correctly that remedies are inappropriate if they are geared "to counteract . . . massive

demographic shifts" unrelated to segregation, P.B. 25, 29 n. 19, but the State put on no proof whatsoever of factors other than segregation that may have caused the continuing racial isolation in KCMSD schools. While the State *now* apparently claims in this Court these conditions in the KCMSD were caused by "such factors as private decision making, local economics, or local demographics," P.B. 26, there is no evidence in the record below supporting this contention. While the State may try to prove these contentions in the district court in conjunction with its forthcoming *first* motion for unitary status, these unsupported factual allegations provide no basis for questioning the decisions under review.

The State likewise offered no evidence that the educational harms caused by segregation in KCMSD actually have been remedied to the extent practicable, but instead asked the district court to infer that opportunities must have improved because more resources are available, while it argued, at the same time, that some of the same programs that it claimed were unitary were so unsuccessful in remedying educational vestiges that they should be terminated. The State offered proof about poor educational results as measured by standardized test scores to support the latter argument, J.A. 415-16, but only offered evidence concerning the resources provided in support of its partial unitary status argument. While the State bore the burden of proof on this question, the District offered evidence that (1) student achievement had improved and (2) this improvement in outcomes reflected better educational opportunities. *See, e.g.*, J.A. 420-23. Specifically, the data and testimony showed that the District had made significant progress toward its "internal goal" of reaching national norms on standardized test scores, but that it still remained substantially below this level. J.A. 413, 420-23, 436-38. The District offered testimony that low student achievement results tend to indicate the continued existence of vestiges of segregation previously identified by the court, J.A. 423, but did not suggest that national norms represented the level KCMSD students would have

attained but for the constitutional violation or would have to reach for it to be cured. The State offered no testimoney that the original educational deficits *by any measure* had been cured to the extent practicable.

As with vestiges in the area of student enrollment, the State now claims, without any support in the record, that the "system-wide reduction in student achievement" found to have been caused by segregation is the result of other "numerous factors . . . outside the control of the schools." P.B. 48. The State's Brief postulates that "a myriad of factors" including "segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement" may be at fault. *Id.* The State cites Judge Clark's 1984 statement that "it may be true that poverty results in low achievement regardless of race." P.B. 48 n.32. The fact that Judge Clark recognizes this possibility, however, makes all the more powerful his subsequent finding of fact that *segregation* caused educational harms to KCMSD students. Even more important, the State acknowledges that it offered not a shred of evidence to the district court about any of its hypotheses. *Id.*[7]

The State now attempts to rationalize this lack of proof about the educational harms caused by segregation in the KCMSD by arguing that the "well settled approach of *Green* makes no provision for" considering educational harms. P.B. 20. The *Green* factors, however, are not a rigid framework or exclusive list. Indeed, *Green* itself held that segregation must be eliminated "root and branch" from "every facet of school operations." *Green v. County School Board*, 391 U.S. 430, 435, 438 (1968). In *Brown*,

[7] The State now references one journal article and the subsequent testimony of its witness, Dr. Alspaugh, which it did not present to the court in conjunction with its partial unitariness claim at all, but seven months later when it tried to demonstrate that the magnet plan was unsuccessful. *Id. See also* P.A. 131. Dr. Alspaugh's principal conclusions did not address the educational programs at issue here, however, and tend to confirm that the educational harms of segregation have not been fully cured. J.A. 509.

this Court recognized that segregation causes educational harms:

> Segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system. [*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).]

In *Milliken II*, the Court again acknowledged these educational harms and expressly approved desegregation remedies designed to address them directly. 433 U.S. at 287-88. In so doing, the unanimous Court recognized that the task undertaken was not one that would be finished overnight:

> These [educational] programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke. . . . Rather . . . the victims of Detroit's *de jure* segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. . . . [*Id.* at 290 (emphasis in original).]

In *Freeman*, the Court reaffirmed the appropriateness of educational remedies. 112 S. Ct. at 1437. The Court also reiterated that under *Green* "a dual school system must be examined *in all facets*," *id.* at 1443 (emphasis added), including, but not limited to, the *Green* factors that "need not be a rigid framework." *Id.* at 1446-47. *See also id.* at 1454 (Souter, J., concurring) (discussing "*Green*-type factors"). The State's radical notion that whether educational harms have been remedied is irrelevant *as a matter of law* finds no support in this Court's jurisprudence and affords the State no protection from the record below.

2. *The Interrelatedness of the Remedial Components.* The Eighth Circuit also correctly concluded that the State

failed to prove that it is unnecessary for the district court to retain jurisdiction over the educational programs that the State claims are unitary in order to ensure compliance with the court's decree in other areas. P.A. 19. "[T]he components of a desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge on the success or failure of another." *Freeman*, 112 S. Ct. at 1449. *See also id.* at 1454 (Souter, J., concurring).

The student assignment remedy here, premised on desegregating student enrollment through parental choice, rather than mandatory busing, is the quintessential example of such synergism. As Judge Clark made clear, it makes no sense to consider eliminating the *Milliken II* relief ordered in this case while vestiges of segregation in student enrollment persist; these educational programs are the foundation of the magnet school plan and the cornerstone of the overall remedy for the vestiges of segregation. The State's evidence failed to suggest how the magnet school plan could possibly be effective in attracting nonminority students (from other schools in the District or from private or suburban schools) to racially isolated KCMSD schools if, for example, the District's class sizes increased substantially, as the State proposed. Judge Clark has found and the Eighth Circuit confirmed that the remedial programs are an "integral part" of the overall remedy, and eliminating one would have serious consequences for the others. P.A. 112, 19. Even if the State had proved that no vestiges of segregation remain in the area of educational quality, which it did not, the decisions below are correct because the State totally failed to meet this independent requirement for partial unitary status.

3. *Good Faith.* Similarly, the State failed to allege or prove that it "has demonstrated a good faith commitment to the whole of the court's decree." P.A. 19 (citing *Freeman*, 112 S. Ct. at 1446). Proving "an affirmative commitment to complying in good faith" requires more than establishing the absence of "further acts of discrimination." *Freeman*, 112 S. Ct. at 1449-50. In *Dowell*, as well, the Court recognized that a "district court need not accept at face value the profession of a [defendant] which has intentionally discriminated that it will cease to do so in the future." *Dowell*, 498 U.S. at 249.

The Eighth Circuit's decision here, however, was far easier, for the State did not even offer such a profession to the district court. The only component of the remedy for which the State is principally responsible, voluntary interdistrict transfers, has never been implemented on a meaningful scale. P.A. 20 n.10.[8] In the proceedings below, it offered no proof whatsoever that might establish its good faith intentions to go forward on a constructive basis. The State tells this Court that there is "no question" as to its "good faith," P.B. 37, but the most recent relevant findings of the district court are that the State has "[1] opposed the implementation of any program offered to desegregate the KCMSD, [2] *never* offered a viable, even tenable, alternative and [3] been extremely antagonistic in its approach to effecting the desegregation of the KCMSD." P.A. 123 (emphasis in original).

4. *Transition Phase.* Judge Clark *sua sponte* has directed the parties to plan for the operation of the KCMSD when the defendants are released from court jurisdiction. P.A. 140-41. Proceedings are in progress in the district court analyzing the implications of a KCMSD financial plan, assuming withdrawal of court-ordered funding at alternative intervals. P.A. 141.

The State thus mischaracterizes the remedy in this case as "ageless in [its] reach into the past, and timeless in

---

[8] The State argues that the Eighth Circuit in an unrelated order has made an interdistrict transfer plan "an essential precondition to unitary status," P.B. 14 n.12, but the Eighth Circuit actually was quite explicit in suggesting not that suburban district acceptance of a plan was required, but that effort by the State to encourage such a plan would go a long way in demonstrating good faith on the State's part. *Jenkins v. Missouri*, 981 F.2d 1009, 1016 (8th Cir. 1992).

[its] ability to affect the future," P.B. 33 (quoting *Wygant v. Jackson Board of Education,* 476 U.S. 267, 276 (1986)). The district court here is already circumscribing the remedy's reach into the future, and this case is far from "ageless." The magnet school portion of the remedy was only implemented at all schools covered by the plan three years ago, and the court-ordered capital improvements still are incomplete. This Court has made clear that the "relevant starting date" for purposes of analyzing a partial unitary status claim is when remedial efforts begin. *Freeman*, 112 S. Ct. at 1436. Thus, this case is not like *Dowell*, where the original finding of segregation occurred 30 years ago and injunctive relief began 19 years ago, but a case in which liability was found only 10 years ago and the first remedial order entered nine years ago, with some remedial efforts begun much more recently. Nor is this a case like *Freeman* in which DeKalb County was subject to court supervision for 25 years.

The State's remarkable assertion that "[n]ot one of today's students has attended school in a *de jure* dual school system" says nothing about conditions of segregation remaining in KCMSD, P.B. 36; many students still attending KCMSD schools unfortunately spent their critical early elementary grades segregated in rotting buildings where they received an inferior education before any effective measures were even begun.

Because the decisions below correctly applied the standards established by this Court in *Dowell* and *Freeman* and held only that the State failed to meet its burden of proof under these workable standards, and because the district court already is pushing this case toward a timely and just resolution, the Court should affirm the decisions below concerning the basic educational improvement remedies in the KCMSD.

II. WHILE THE STATE SUGGESTS THAT THE LOWER COURTS HAVE ESTABLISHED SOME SPECIFIC LEVEL OF ACHIEVEMENT ON STANDARDIZED TESTS AS A PREREQUISITE TO UNITARY STATUS, THEY HAVE NOT DONE SO, BUT HAVE STATED ONLY THAT EFFECTIVENESS SHOULD BE THE TEST OF WHETHER THE EDUCATIONAL COMPONENTS OF THE REMEDY HAVE MET THEIR GOALS

A. In Its Unsuccessful Effort To Secure Rehearing *En Banc*, the State, and Not the Lower Courts, Created a "Standardized Test Scores" Prerequisite to Partial Unitary Status

According to the State, this Court should reverse the Eighth Circuit because it allegedly created some new requirement for unitary status: "improved test scores as measured by national averages," P.B. 47, or a "suburban comparability in test scores," requirement. P.B. 22.[9] In fact, the panel opinion nowhere mentions the words "standardized test scores," "test scores," "national averages," or anything of the kind, and carefully follows the analysis described by this Court in *Freeman*. In explaining his reasons for rejecting the State's claim that these programs should be ended, Judge Clark did not focus on test scores either. P.A. 112-13. If the Court granted *certiorari* to review this question, which the State claimed was presented, the State has given it little to work with. Indeed, the State's Brief now backhandedly acknowledges this by devoting only four pages to this issue, merely repeating an abbreviated version of the argument made in its Petition. P.B. 45-49.

The State itself manufactured the alleged student-achievement-as-measured-by-test-scores standard out of one

---

[9] The Brief of Petitioners is very vague on the precise nature of the State's complaint. While it cites national averages and suburban comparability as inappropriate measures of educational improvement, it inconsistently criticizes the courts below for allegedly failing to provide any "meaningful discussion" of "the relevant criteria for determining whether the Kansas City school system has become unitary." P.B. 20.

sentence of very general dicta in the panel opinion. Having rejected the State's partial unitary status argument because the record below demonstrated compliance, but failed to show that any of the other *Freeman* standards had been met, P.A. 19, the Eighth Circuit offered some further guidance to the parties in the following dicta:

> In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD had become unitary, *a few further words are appropriate* . . . . When the question of quality of education is reached, however, the issue is far more complex. The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. [P.A. 20-21 (emphasis added).]

The last sentence in the quoted passage, taken out of context, is the State's textual basis for its extrapolation that the panel imposed an arbitrary test score standard for partial unitary status. In fact, the author of the panel opinion, the Honorable John R. Gibson, in the Eighth Circuit's subsequent opinion denying rehearing *en banc*, expressly disavowed rigid reliance on test score results:

> Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration they are unitary. [P.A. 48.] [10]

[10] Judge Clark also expressly acknowledged that it is "no constitutional violation to not provide quality free education." J.A. 482. Both the lower courts, therefore, as well as all the parties agree that "this Court has repeatedly held that education *per se* is not a fundamental right." P.B. 46 (citing *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

The dissenters from denial of rehearing *en banc* ignored what the panel said and adopted the State's interpretation of what the panel had wrought: "The only factor . . . standing in the way of unitary status for the educational programs was continued below average academic performance." P.A. 61. A fairer reading of the Eighth Circuit's brief dictum about assessing whether educational harms have been eliminated—"success of the quality education programs must be measured by their effect on the students"—is as a reaffirmation of the well-settled principle that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed in assessing a school desegregation remedy. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). This Court held early on in *Raney v. Board of Educ.*, 391 U.S. 443 (1968), and recently reaffirmed in both *Dowell* and *Freeman*, that a release of jurisdiction upon a showing merely that a school district adopted a remedial plan would "be inconsistent with the responsibility imposed on the district courts by *Brown II*." 391 U.S. at 449 (citations omitted).

The standard for judging a desegregation remedy is whether it puts the victims of unconstitutional conduct as nearly as reasonably possible in the position they would have been but for the constitutional violation. *Milliken II*, 433 U.S. at 280-81. Indeed, the cases that the State marshals in support of its argument that the Court should abandon its consistent jurisprudence establishing *effectiveness* as the standard for assessing desegregation remedies, address the distinct question of whether an "equal protection injury" sufficient to provide the basis for liability has been shown, and not the separate legal

issue presented here of whether adjudicated constitutional injuries have been cured to the extent practicable. *See* P.B. 46-47 n.31 (citing *inter alia Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993)).[11] Establishing that a constitutional violation has occurred and determining whether it has been remedied are obviously different inquiries. The plaintiff seeking to establish a Fourteenth Amendment violation bears the burden of proving intentional discrimination denying equal opportunity. In contrast, the defendant seeking unitary status bears the burden of proof to establish that the injuries caused by such a denial have been remedied to the extent practicable. *Freeman*, 112 S. Ct. at 1444-45. Here the State did not present such evidence.[12]

B. All Parties Agree That Neither the State nor the School District Should Be Required To Ensure That Students Meet National Norms on Standardized Tests as a Prerequisite to Partial Unitary Status in the Area of Educational Quality

While the KCMSD has an "internal goal" of providing an education to all of its students that allows them to meet or exceed national norms, J.A. 413, the District expressly disavows the notion that "improved test scores, as measured by national averages" must necessarily be

[11] Likewise, the principal question in *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 991 (1976), on which the State also seeks to rely, P.B. 35, was whether the Fifth Circuit had applied the correct standard in determining whether there was intentional discrimination sufficient to establish liability.

[12] The State also incorrectly suggests that this is a case somehow like *Richmond v. J.A. Croson*, 488 U.S. 469 (1989), where a city voluntarily adopted an aggressive affirmative action plan denying opportunities to non-minority contractors without a sufficient showing that there had been past discrimination against minorities or that the city had another compelling state interest justifying such an action. P.B. 24. Here, in contrast, after a 92-day liability trial, the district court made extensive, unchallenged findings of severe constitutional violations with specific devastating effects and only then ordered a remedy designed to address them.

achieved for it to be unitary. P.B. 47.[13] Establishing fixed student outcomes as a precondition to unitary status would be inappropriate because a court-mandated desegregation remedy must be designed to cure the harms *caused by the constitutional violation*. Just as independent demographic factors can sometimes affect the racial composition of student enrollments, independent factors can affect student performance. The possibility of such factors, however, cannot absolve the State and KCMSD of the responsibility to remedy the harms in fact caused by segregation.

This Court's opinions in *Freeman* and *Dowell* have provided the federal courts with ample guidance concerning how to determine whether this task has been accomplished and when desegregation decrees may be terminated. The standards articulated in *Freeman* and *Dowell* are being applied, and this Court's allocation of the burden of proof to the defendants has not foreordained the result in these cases. *Cf. Freeman*, 112 S. Ct. at 1452 (Scalia, J., concurring). The State need have no fear that application of the holdings of *Freeman* and *Dowell* to the issue of educational quality in Kansas City will result in a perpetual remedy. Courts applying this Court's *Dowell* or *Freeman*

[13] The State simply misrepresents the testimony of District officials in suggesting that they advocated a rigid standard of national norms on standardized test scores as a prerequisite to unitary status. The State claims that "KCMSD's Superintendent agreed . . . that the only hurdle to unitary status was that KCMSD students reach the 'national norm, the 50th percentile,' in achievement on standardized tests." P.B. 17-18 n.15. To the contrary, Superintendent Walter Marks testified unequivocally that (1) no fixed student achievement or racial balance standard had been adopted by the courts, J.A. 412, 414; *see also* J.A. 428; (2) national norms on standardized tests were strictly an internal goal, J.A. 413; and (3) it is possible that KCMSD could achieve unitary status without reaching this internal goal. J.A. 414. The State also incorrectly claims that a KCMSD administrator "endors[ed] a 100-year remedy," P.B. 26 n.16, where in fact the witness simply testified in response to a series of leading questions on cross-examination that the length of time was less significant than whether the harm had been remedied. J.A. 428-29.

standards have reached varying results; most district courts found the defendant unitary or partially unitary,[14] although at least two have declined to do so.[15] Five of the decisions that we have located have been appealed, and the district courts were affirmed three times and reversed twice.[16] As should be expected, these courts reached different conclusions; the harms caused by segregation were not the same everywhere, defendants' remedial efforts and local conditions differ, and district courts make different judgments in the exercise of their discretion to bring school desegregation cases to an appropriate end. This Court has consistently emphasized both the breadth of the federal courts' equitable powers to remedy past discrimination, *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), and the substantial deference owed to the lower courts' exercise of those powers because they have "first hand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann*, 402 U.S. at 6).

While determinations about whether educational harms have been cured may be more "ineffable" or "complex"

[14] *See Stell v. Board of Pub. Educ. of Savannah*, 860 F. Supp. 1563 (S.D. Ga. 1994); *Tasby v. Dallas Ind. Sch. District*, No. 3:4211-H (N.D. Tex. July 26, 1994); *Cisneros v. Corpus Christi Ind. Sch. District*, C.A. No. 68-C-95 (S.D. Tex. July 29, 1992); *Dowell v. Board of Educ. of Oklahoma City*, 778 F. Supp. 1144 (W.D. Okla. 1991), *aff'd*, 8 F.3d 1501 (10th Cir. 1993); *Lee v. Talladega County Bd. of Educ.*, 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993); *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992); *Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987), *rev'd*, 892 F.2d 851 (10th Cir. 1989), *vacated*, 112 S. Ct. 1657 (1992), *opinion reinstated*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1994).

[15] *Coalition to Save Our Children v. State Bd. of Educ. of Delaware*, 757 F. Supp. 328 (D. Del. 1991); and *Morgan v. Burke*, 926 F.2d 86 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1664 (1992).

[16] *Lee v. Etowah County Bd. of Educ.*, 963 F.2d at 1425; *Brown v. Board of Educ.*, 978 F.2d 585 (10th Cir. 1992).

than determinations about the existence of other vestiges, *Freeman*, 112 S. Ct. at 1441; P.A. 20, they are necessary and can be made under the standards already established by this Court. Where educational harms traceable to segregation have been found to exist, under the principles established by this Court, effectiveness in alleviating educational deficits caused by segregation and in providing equal educational opportunities regardless of race should be the standard of whether such vestiges have been eliminated. If effectiveness were not the test, and instead only the resources provided were the measure, educational harms would be "cured" as soon as the remedy begins to be provided. This would lead to the fallacious result that resources could be improved and particular programs deemed "partially unitary" almost immediately, then eliminated under the principles articulated in *Dowell*, with no beneficial impact on the children harmed by segregation.[17]

There are a variety of indicators that the lower courts may use to determine if educational vestiges have been eliminated. The availability of resources may be one of them. *See, e.g., Freeman*, 112 S. Ct. at 1441-42. The relevant inquiry should include the provision of teachers, facilities and programs, as the State suggests, but also may include an inquiry into whether students are treated differently depending on their race:

> Are more minority students suspended or expelled *for similar offenses* than their white peers?[18]

[17] The amicus brief filed in support of the State by the Landmark Legal Foundation actually undermines the State's position that examining what resources have been provided should be *the sole* measure of whether educational harms have been remedied. Landmark relies heavily on the research of Eric Hanushek, which indicates that there is no systematic relationship between school expenditures and school performance. Brief for Amici Curiae In Support of Petitioners at 14-17. If this is true, looking exclusively at dollars spent, or resources provided, must be an inadequate measure of effectiveness.

[18] *See, e.g., Tasby v. Estes*, 643 F.2d 1103, 1107 (5th Cir. 1981); *United States v. Wilcox County Bd. of Educ.*, 454 F.2d 1144, 1145 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1972).

Are more minority students *inappropriately* placed in special education classes or remedial tracks? [19]

Are fewer eligible minority students *recommended for* or *placed in* honors or advanced placement courses? [20]

Do teacher attitudes and practices reflect *lower* expectations for minority students? [21]

Trial courts also should look to actual student performance to help determine if the provision of resources and the reform of discriminatory practices have been effective in compensating past victims and ensuring equal educational opportunities regardless of race. *See, e.g., Yonkers*, 833 F.Supp. at 220-25. Results can be measured in a number of ways including student attendance, grades, drop-out rates, post-secondary enrollment, and test scores. It is by no means unprecedented, however, for the Eighth Circuit to have indicated that test results should be among the factors considered, particularly given the unchallenged findings of severe educational harms in the KCMSD.[22]

But none of these factors, including test scores, should be considered a bright-line test. If disparities appear to exist between the victims of segregation and non-victims, or between white students and black students, this may or

[19] *See, e.g., Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 949-50 (11th Cir. 1989); *People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905, 912-15 (N.D. Ill. 1994).

[20] *See, e.g., Jacksonville*, 883 F.2d at 949-50; *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 659 F. Supp. 363, 368 (E.D. Ark. 1987).

[21] *See, e.g., United States v. Yonkers*, 833 F. Supp. 214, 222 (S.D.N.Y. 1993); *Bradley v. Milliken*, 402 F. Supp. 1096, 1139 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

[22] *See, e.g., Freeman*, 112 S. Ct. at 1441-42 (district court evaluated "objective evidence of black achievement," the Iowa Test of Basic Skills, in determining whether or not the school district had achieved unitary status); *Yonkers*, 833 F. Supp. at 220-22; *Coalition to Save Our Children*, 757 F. Supp. at 332; *Brown*, 671 F. Supp. at 1307; *Reed v. Rhodes*, 455 F. Supp. 546, 598 (N.D. Ohio 1978).

may not mean that the constitutional harms have not been effectively remedied or that discriminatory practices persist. Trial courts should in the first instance consider such evidence, and if no relevant disparities exist may conclude that the educational harms of segregation have been cured. If disparities exist, however, this should not end the inquiry. Such current disparities in outcomes may not be traceable to past segregation, and, therefore, defendants may be released from court jurisdiction if they can prove that factors other than segregation caused them. *Freeman*, 112 S. Ct. at 1448; *see also Fordice*, 112 S. Ct. at 2736. School desegregation remedies are intended to be temporary, and there may come a point when even disparities found to be attributable to segregation have been reduced so much, or have proven so resistant to reduction, that no further remedial actions are practicable or educationally sound. If the defendant can prove that no further educationally sound remedy can reasonably be expected effectively to address any such lingering harms, this Court has indicated that it may be appropriate to allow such remaining constitutional harms to go unremedied. *Dowell*, 498 U.S. at 250 (vestiges of segregation must be eliminated "as far as practicable").[23]

We have no quarrel with this Court's clear standards, and it is apparent from the record below that the courts understand them and stand ready to apply them should the State or the KCMSD supply them with the appropriate evidence upon an actual motion for unitary status. The State did not file such a motion or provide such evidence and, for this reason, we respectfully submit the writ here was improvidently granted.

[23] The State disingenuously accuses the district court of dismissing the "practicability" inquiry under *Freeman* and *Dowell* because in a separate proceeding it stated that the District had not reached "anywhere close to its maximum potential." P.B. 45-46 n.30 (quoting Pet. App. 131). At that proceeding concerning magnet schools, the question of unitary status was *never mentioned* and the district court was agreeing with the State that more desegregation could be accomplished through the magnet plan. *See supra*, page 13.

III. THE STATE IMPROPERLY INVITES THIS COURT TO AVOID THE ISSUES PRESENTED IN ITS PETITION AND INSTEAD TO DISTURB FINAL FACTUAL FINDINGS AND REVERSE THE SETTLED LAW OF THIS CASE ON ISSUES NOT RAISED BELOW AND NEITHER FAIRLY PRESENTED BY ITS PETITION NOR NECESSARY TO THE RESOLUTION OF THE QUESTIONS THAT ARE PRESENTED

The State attempts to use its Petition as a Trojan horse to attack long-settled factual findings and legal rulings in this case. This Court should reject this ploy. The State betrays its representations to this Court that it "has no intention of relitigating decades-old liability issues," Petitioners' Reply Memo at 2 n.1, and "does not seek review of any factual findings," *id.* at 8. The State relegates the principal question articulated in its Petition—which itself is not actually presented by this controversy—to four pages of its Brief, and devotes virtually all its Brief instead to long-settled factual and legal issues that are outside of the scope of the questions upon which this Court granted *certiorari*.

In essence, the first 45 pages of the State's Brief repeat over and over three principal arguments about the State's liability, the injuries it caused, and the proper remedy for those injuries, all of which are incorrect, but more importantly have been finally resolved against the State in previous proceedings not presently under review:

(1) The State was not really all that responsible for segregated conditions in the KCMSD in 1984, *e.g.*, P.B. 36-37;

(2) The constitutional violations in Kansas City did not (or could not as a matter of law) cause white flight and reduced student achievement, *e.g.*, P.B. 37-42; and

(3) Those portions of the remedy designed to promote voluntary student transfers between districts were inappropriate, *e.g.*, P.B. 30-32.

For several reasons the Court should not address these issues.

First, *none* of these three issues is presented in the State's Petition. This Court's Rule 14.1(a) states that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 24.1(a) similarly provides that a brief on the merits "may not raise additional questions or change the substance of the questions already presented." *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992).[24]

Second, *all* of the State's three new arguments depend on the reversal of factual findings the district court made and the court of appeals affirmed long ago, or that the district court made and the State did not appeal. It is this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred." *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980).[25]

The Court imposes a "heavy burden" on the party wishing to upset the factual findings of two lower courts. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975). The State ignores this burden. Nor should this Court review those factual findings which were made by the district court and which the State did not appeal to the Eighth Circuit. This Court routinely accepts as true the factual findings of a district court when those findings are not disturbed on appeal.[26]

---

[24] *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (*per curiam*); *United States v. O'Brien*, 391 U.S. 367, 386 n.31 (1968) (issues "not raised in the petition for certiorari . . . are not before the Court."); *Namet v. United States*, 373 U.S. 179, 190 (1963) (same).

[25] *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98 n.15; *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1499 (1993); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n.5 (1985).

[26] *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 n.1 (1991); *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 750 n.32 (1977).

Third, *none* of the State's new claims were addressed in the judgments under review. This Court ordinarily does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*).[27] Because the validity of these rulings was not contested below by petitioner in these proceedings, this Court should not pass upon them now.

Finally, *all of* the State's new claims also challenge legal determinations long ago settled in this case. This Court should adhere to its principle that a legal decision made at one stage of a proceeding is normally followed in future stages of the same litigation. *Arizona v. California*, 460 U.S. 605, 618 (1983). Here, there is no indication that the ten-year-old decisions on liability and the 1985 *Milliken II* order in this case were "clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8. Indeed, they are rooted firmly in this Court's jurisprudence.

A. The State's Attacks on the Findings Concerning Its Liability, the Effects of Its Violation, and the Remedy Necessary To Cure Them Have Been Finally Resolved and Are Not Before the Court

Each of the State's three principal new arguments should not be reviewed by this Court because of the four considerations outlined above.

1. *State Liability.* The State's argument that its liability is premised exclusively on the attenuated basis of its pre-1954 conduct was not presented in its Petition or in the proceedings below and failed 10 years ago, for two reasons. P.B. 22, 36-37. First, its pre-1954 discriminatory conduct was pervasive, and the district court so found in 1984. J.A. 46-47. Second, the State's liability was also premised on its utter failure to do anything to satisfy its affirmative duty to dismantle the dual school system.

[27] *See also Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957).

J.A. 47-50 (citing, *inter alia, Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979) (*"Dayton II"*). This Court has only recently reiterated that liability may be predicated in part on a finding that the defendant "never actively set out to dismantle [the] dual system." *Freeman*, 112 S. Ct. at 1450 (citations omitted). The State did not appeal this liability decision and admits that it may not now directly ask this Court to overrule it. P.B. 7 n.8.

The State also attempts to minimize its liability by devoting seven pages of its brief to the June 5, 1984 Order dismissing the school districts surrounding the KCMSD from the litigation. P.B. 4-5, 27-28, 31, 36 and 38. The State, however, nowhere acknowledges that this order addresses *exclusively* the question of whether there exists a basis for including suburban school districts in the Kansas City area in a mandatory interdistrict remedy; it does not address the question of the *State's* liability or the effects in the KCMSD of the *State's* violation. Only after further proceedings, including presentation at trial of the State's case, did Judge Clark, on September 17, 1984, begin the series of orders dealing with the liability of the State and the KCMSD and the effects of their violations, which include some interdistrict effects, such as white flight to suburban and private schools. J.A. 14-53. Thus, the State's claim that the effect of the underlying violation is "solely intradistrict in scope" is incorrect. P.B. 14.

2. *Effects of the Violation.* The State boldly pronounces that the vestiges of segregation identified in this case 10 years ago were not really caused by segregation after all. *See* P.B. 20-22, 37-42. This argument is nowhere to be found in the State's petition. Moreover, ignoring the record in this case as well as the law of the case, the State now claims that the district court and the Eighth Circuit were simply wrong 10 years ago in finding that segregation had caused white flight from the KCMSD and implies that the lower courts likewise erred in finding that virulent segregation had severely damaged

educational opportunities in the KCMSD. While the State did not make this claim below, even the dissenters from denial of rehearing *en banc* expressly noted that segregation had caused "white flight to private and suburban schools" and a "system-wide reduction in student achievement." P.A. 51-52.

a. *White Flight.* The State's suggestion that white flight "was the result of desegregation—not segregation," P.B. 4-5 n.3, is contrary to the court's explicit findings. J.A. 126 ("segregated schools, a constitutional violation, has led to white flight"). The State attempts here to resurrect its attack on Judge Clark's factual findings concerning the white flight caused in KCMSD by the constitutional violations, P.B. 38 ("lack of factual support"), despite the fact that the Eighth Circuit twice rejected precisely the same contention more than six years ago. *Jenkins,* 807 F.2d at 683; *Jenkins,* 855 F.2d at 1302-03. The State did not seek this Court's review of the *en banc* Eighth Circuit's first decision on this point at all. After the Eighth Circuit's second ruling on this issue, the State presented this Court in its 1988 petition for a writ of *certiorari*—challenging the scope of the magnet school plan and the capital improvements—with precisely the same formulation of the argument it uses now. No. 88-1150, Petition at 17-18. Contrary to the findings already twice concurred in by the lower courts, the State claimed then that those courts were "turning effects of desegregation into effects of segregation." *Id.* at 18. *See* P.B. 39. This Court refused to grant *certiorari* on this issue, 490 U.S. 1034 (1989), and there is no reason for the Court to question these long-settled factual findings now.[28] The

[28] Moreover, the "demographics" that the State asks this Court to rely upon to make *de novo* findings of fact actually support the lower court's original finding that the State's failure to dismantle the dual school system in the KCMSD caused white flight. P.B. 4-5 n.3. During the period from 1954 to 1984 the black percentage of the District's enrollment increased from 19 percent to 68 percent. KCMSD Exh. K2 (1984). During the period from 1977 to 1984, when the State claims KCMSD was desegregating and creating white flight, black enrollment changed by only four percentage points. KCMSD Ex. K2. It is precisely because of this type of factual misstatement that this Court should hold fast to its customary refusal to disturb the findings of fact below.

State's suggestion that white flight, *as a matter of law,* cannot be caused by segregation is also unsupportable. Indeed, in *Freeman* itself, several Justices explicitly noted the fact that a defendant's actions *may* encourage white flight. 112 S. Ct. at 1454 (Souter, J., concurring); *id.* at 1458 (Blackmun, J., concurring). Demographic changes may be "caused by past school segregation and the patterns of thinking that segregation creates." *Id.* at 1454. Numerous federal courts also have found that segregative practices caused white flight.[29] Here, the courts repeatedly found, based on extensive evidence, that they did in Kansas City.

b. *Educational Harms.* The State now also seeks belatedly to challenge the oft-repeated findings concerning the severe educational harm caused by segregation in the KCMSD. P.B. 40-42. The State's suggestion that educational harms *as a matter of law* cannot be a vestige of segregation runs contrary to this Court's consistent school desegregation jurisprudence over the last 40 years. Any contention that as a matter of fact educational harms were not caused by the State and KCMSD is equally frivolous; Judge Clark's first liability order expressly recognized such harms, J.A. 23, extensive evidence supported them, and his remedial orders confirmed them. J.A. 23-24, 126. The State did not challenge the initial liability order nor claim that the findings of fact concerning the educational harms were clearly erroneous. The Eighth Circuit repeatedly noted and reaffirmed these findings as well-

[29] *See, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 778 F.2d 404, 417 n.8 (8th Cir. 1985), *cert. denied,* 476 U.S. 1186 (1986); *Berry v. School Dist. of Benton Harbor,* 467 F. Supp. 630, 686 (E.D. Mich. 1978); *Arthur v. Nyquist,* 415 F. Supp. 904, 929 (W.D.N.Y. 1976), *aff'd in relevant part,* 573 F.2d 134 (2d Cir.), *cert. denied,* 439 U.S. 860 (1978).

supported by the record. *See, e.g., Jenkins,* 855 F.2d at 1300; *Jenkins,* 807 F.2d at 683-84. As the dissenters from denial of rehearing *en banc* below stated succinctly, "[t]here is no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination." P.A. 63.

3. *Remedy.* The State's final effort to expand its questions presented beyond the issues actually involved in the decisions under review is its claim that these issues raise the "fundamental issue of the propriety of the ultimate remedial purpose." P.B. 18-19. Specifically, the State challenges the "system-wide" and allegedly "interdistrict" nature of the remedy. Inasmuch as these contentions rest principally on the State's challenge to the long-resolved factual findings about the harms caused by the violation, this Court should not address them because precisely the same legal issues have been litigated before in this case, and long since finally resolved against the State. The dissenters from the denial of rehearing *en banc* below emphasized that the goals of the remedy were well-settled and unquestioned. P.A. 63 ("I do not question those goals. The appropriate question now is, have some or all of the goals been met when the proper test is applied?").

The State's argument that any "system-wide" relief in this case is inappropriate, P.B. 9-10 n.9, 21, is not presented in its Petition, was not argued in the proceedings under review here, and has long since been finally resolved against the State. In 1985, the State initially opposed all districtwide relief in this case, claiming that such relief was not tailored to the scope of the violation: "In our view, the plaintiffs and the KCMSD failed to demonstrate that the existence of segregated conditions . . . caused particular harm to students in nonsegregated schools." Memorandum of the State of Missouri Regarding the Remedy Hearing and Alternate District-Wide Plan (filed April 29, 1985) at 1. However, the district court rejected

this view, finding explicitly that the constitutional violation had harmed students districtwide. J.A. 23.

The State also raised this argument in an early appeal challenging two of the *Milliken II* programs for which the district court had required it to pay the full cost. While the *en banc* Eighth Circuit agreed with the State that costs should be shared, it rejected the State's contention that the systemwide nature of the programs was excessive. *Jenkins,* 807 F.2d at 684-85. In a subsequent appeal, the State again raised precisely the same legal argument, claiming that magnet school programs that benefited non-minority students or minority students in integrated schools exceeded the scope of the violation. *Jenkins,* 855 F.2d at 1303-04. The Eighth Circuit rejected this argument on two grounds. First, it found that the systemwide improvements were not ordered as an end in themselves but "as a means . . . of restoring to the victims the education they have been denied" and of desegregating KCMSD student enrollments. *Id.* Second, the Court held that it was appropriate to order a systemwide remedy where all students had been "deprived" by a system that was inferior *because of* discrimination against African-Americans. *Id.* In unsuccessfully seeking *certiorari* in 1988 to review this decision, the State did not renew these arguments. Moreover, this Court has long made clear and recently reiterated that practices with a systemwide impact form "an appropriate basis for a systemwide remedy." *Freeman,* 112 S. Ct. at 1450 (quoting *Dayton II,* 443 U.S. at 534).

Prior to its Brief to this Court, the State has not complained that the *Milliken II* relief in this case was impermissibly "interdistrict" in its scope. Indeed, while it opposed the initial voluntary interdistrict transfer plan and magnet school proposals in the district court, the State itself *proposed* many of the basic *Milliken II* educational improvement programs in 1985. Even in these proceedings, the State stipulated to "the scope of the program as proposed" regarding the *Milliken II* remedies. J.A. 376.

The State should not be heard now by this Court to contest them as somehow impermissibly interdistrict or systemwide.

The State *has* complained before about the lower courts' use of the quality of education in suburban districts as a guide in developing the magnet school and capital improvement remedies, and about the goal of attracting suburban non-minority students back to the District. The Eighth Circuit explicitly rejected these contentions. *Jenkins,* 855 F.2d at 1302-03. The State raised precisely these same issues in its 1988 petition for a writ of *certiorari.* No. 88-1150, Petition at 12. The State claimed that the goals of the remedy were impermissibly "to make the Kansas City system comparable to the 'average . . . suburban district' " and to attract "more white students to the district." *Id.* This Court denied *certiorari* on these issues concerning capital improvements and the magnet school plan.[30]

Finally, the State also claims in this Court that the issue presented by the salary relief for non-instructional employees ordered by the lower courts is whether it is error to implement "an interdistrict remedy in an intradistrict case." P.B. i., 49. The salary orders below, however, have nothing to do with interdistrict issues and do not rest solely on a "desegregative attractiveness" rationale, P.B. 43. They are based on the broader findings (1) that adequate salaries are necessary to implement the remedy as a whole including the basic educational improvements, P.A. 87, and (2) that the State's constitutional violation had contributed to the District's inability

---

[30] In any event, the magnet school plan, which is not before the Court, is not "interdistrict" relief as the State suggests. P.B. 30 n.20. The magnet schools in the KCMSD do not "pierce the territorial integrity of [suburban] school districts" at all, *id.*, but rely exclusively on the voluntary choices of families, white and black, about where their children should attend school. This is not an interdistrict remedy even remotely comparable to that rejected in *Milliken I.*

on its own to provide normal salaries. The salary relief was not ordered so much to attract white students as to prevent a mass exodus of qualified teachers and staff needed to implement the remedy.

B. The Salary Relief Ordered for Non-Instructional Personnel Is Based Firmly on Factual Determinations That Also Have Been Finally Resolved Against the State in Earlier Proceedings.

These Respondents concur in the position of the Jenkins Respondents that the findings of the district court and court of appeals that salary relief is necessary to support the desegregation plan should not be disturbed. We incorporate by reference the Brief of Respondents Jenkins *et al.* at pages 27-29.

CONCLUSION

It remains unclear just what the State asks this Court to do. In seeking *certiorari*, the State proclaimed that it does not "ask this Court to declare partial unitary status. Petitioners seek only correction of the erroneous legal standard applied below." Reply Memo at 8. At the end of its wide-ranging brief, however, the State concludes that the Court should "reverse" the orders below. P.B. 50. We cannot believe that the State intends that this Court could declare any part of the District "unitary" without further proceedings below, because such a process would be diametrically opposed to the procedures required by this Court in *Dowell* and *Freeman*. Unless that is what the State suggests, however, its request that the Court simply "reverse" the decisions below makes no sense.

For all of the reasons stated herein, the Petition should be dismissed as improvidently granted or, alternatively, the decision below affirmed.

Respectfully submitted,

SCOTT A. RAISHER
FREDERIC O. WICKHAM
BRIAN P. WOOD
JOLLEY, WALSH & HAGER, P.C.
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755

DAVID J. STROM
AMERICAN FEDERATION
OF TEACHERS, AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-7472
Counsel for Respondent
American Federation of
Teachers Local 691

ALLEN R. SNYDER *
PATRICIA A. BRANNAN
JOHN W. BORKOWSKI
LORI-CHRISTINA WEBB
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741
Counsel for Respondent
Kansas City, Missouri
School District

December 6, 1994

* Counsel of Record